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**The rule of law and emergency in colonial India  
The conflict between the King's Court and the government in Bombay in the 1820s**

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The rule of law and emergency in colonial India: The  
conflict between the King's Court and the government in  
Bombay in the 1820s

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## Abstract

This thesis argues that the jurisdictional conflicts between the King's Court and the government in Bombay in the 1820s led to the construction of a more despotic political structure of colonial India, in which the government retained the power of political intervention in judicial affairs in cases of emergency. The background was the political, economic and social crisis in the newly acquired territories in the Bombay presidency in the mid-1820s. The main concern of the government was the raids of the 'wild tribes' in the hills and their alliance with the princes in the plains. The government tried to deal with it by a form of indirect rule relying on Indian chiefs and aristocrats and implemented conciliation policies, among which their exemption from the Company's judiciary was the most important. But the King's Court obstructed this policy by issuing warrants and writs to the chiefs, which weakened their authority and respectability in local society. In addition, by overturning the decisions of the Company's Court and trying and punishing governors and other officials, the King's Court endangered the Company's sovereignty in the mofussil. The government believed that the unitary judicial structure should be devised in India and the King's Court should be subordinated to the government. This tension exploded in a case of habeas corpus in 1828. The King's Court's jurisdiction was disputed in Bombay, Calcutta, and London. As the result, the British parliament established a legislative council in India in the Company's new charter in 1834, by which the King's Court was subjugated to the governor general's legislative authority. I contend that the driving force of the making of British despotism in early nineteenth-century India was Indian use of the King's Court and the government's anxiety of sovereignty in the aftermath of the conquest.

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## Introduction

### I. Theme, historiography, and argument

The British empire in India might have been destroyed by lawyers. The government officials of the East India Company talked about the possibility for many years. They feared that the chieftains in the hills and mountains and the landed nobility in the plains had rallied around the Supreme Court, commonly called the King's Court (as it was established by a separate royal charter), and gone into the revolt. To attest their fear, the court even threatened to enlist the military's help to enforce its orders, which was supported by many Indians in cities and the countryside. The court of law might have succeeded the Company as the next sovereign of the Indian subcontinent.

The crisis reached a climax in a legal case in Bombay in 1828. The Supreme Court of Bombay issued a writ of habeas corpus to a nobleman of the former Maratha empire. This was an outright subversion of the government's policy of conciliating 'the natives of rank'. The government interfered and ordered the court to stop its proceedings. The result was an open collision between the two British authorities lasting for more than two years, which generated a sense of crisis among the government officials. John Malcolm, the governor of Bombay at that time, thought that the empire was on the brink of collapse:

Our physical power in this country (as European nation) is nothing. We stand solely upon that of opinion and above all that which attached to a belief of our complete union amongst ourselves & our consequent means of prompt combination to crush any opposition of unsupported princes



on divided tribes & nations. .... If an impression is once given that we are divided, as it must be if a collision of British authorities is apparent to the natives of our provinces, the latter ignorant and incapable of comprehending our system of law, its forms and its fictions will see nothing in the clashing of the warrants and writs of the Supreme Court with the rules and orders of the local government, but a struggle for power of the extent of which they are uninformed but which will be alike magnified by the fears of those who look for our support and the hopes of those who anticipate our downfall. In the progress of such impressions I repeat my opinion that there is more danger than in the defeat of our armies or the loss of provinces. Such misfortune may be recovered, but the charm of opinion and above all that which rests upon the supposed union and concord of the different branches of our rule, if once broken will never be redeemed.<sup>1</sup>

Malcolm's point was that the 'system of law, its forms and its fictions' were a hindrance to the 'complete union amongst ourselves' which was necessary 'to crush any opposition of unsupported princes on divided tribes & nations'.

This sense of danger was derived from the government officials' basic logic or assumptions on colonial governance, which were diametrically opposed to those of the lawyers. As I shall explain in the next section, the different logics of governance in India—which I call 'the logic of emergency' and 'the logic of law'—were based on different conceptions of politics, society, and law in India, which made it difficult for both the government and the King's Court to conciliate with each other.

The Bombay crisis is important because it was one of the decisive moments for the emergence of British despotism in India. Malcolm's sense of danger was shared by the supreme government in Calcutta and the home authorities in London (the Court of Directors and the Board of Control). When

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<sup>1</sup> British Library, London [hereafter BL], India Office Records [hereafter IOR] L/PJ/3/918, Bombay Judicial Letter [hereafter BJL], Government [hereafter Gov.] to Court of Directors [hereafter CoD], 27 Sep. 1828, John Malcolm, minute, 24 Aug. 1828.

the EIC's charter was renewed in 1834, they subjugated the King's Court to the Company by vesting the governor general in Calcutta an all-India legislative power as the head of a legislative council. This meant that the British parliament exempted the colonial government in India from the rule of law.

This thesis tries to understand the context, process, and result of this crisis in Bombay in the 1820s to understand the factors which suppressed the rule of law and facilitated the rise of despotism in colonial India. Scholars have argued that British colonialism became more despotic in the early nineteenth century. David Washbrook succinctly summarises it as follows:

Here, as in the colonial Empire more generally, the idea of a rule of law became fatally confused with that of a rule by law under which 'civil society', while perhaps directed by general legal principles, is denied any part itself in formulating those principles; while the state may make law for its subjects, it posits itself as above that law and as unaccountable to it. British-Indian law became less a tool of liberty than an instrument of despotism.<sup>2</sup>

Historians have pointed out that this was the result of the crucial transformation of British colonialism in India in the early nineteenth century from hybrid, plural and networked colonial politics centred on maritime coastal cities to a sovereign, bureaucratic and militarist territorial domination based on 'colonial knowledge'.<sup>3</sup> Legal historians have given a fresh insight to

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<sup>2</sup> D. A. Washbrook, 'India 1818–1860: The two faces of colonialism', in Andrew Porter (ed.), *The Oxford history of the British empire volume III: The nineteenth century* (Oxford, 1999), 407.

<sup>3</sup> C. A. Bayly, *Imperial meridian: The British empire and the world 1780–1830* (Harlow, 1989); Douglas M. Peers, *Between Mars and Mammon: Colonial armies and the garrison state in India 1819–1835* (London, 1995); Radhika Singha, *A despotism of law: Crime and justice in early colonial India* (Oxford, 1998); Robert Travers, *Ideology and empire in eighteenth-century India: The British in Bengal* (Cambridge, 2007); Jon E. Wilson, *The domination of strangers: Modern governance in eastern India 1780–1835*

this by pointing out a parallel change from hybrid and multi-centred legal pluralism to a more state-centred sovereign form of justice in the early nineteenth century.<sup>4</sup> Recent histories of ideas also point out that an earlier attitude of enlightenment universalism was replaced by utilitarian liberal authoritarianism which justified the colonial state's unconstitutional regime of violence.<sup>5</sup> Understanding the nature of this transition has been one of the most important themes of British imperial history.

Legal historians have made distinctive contributions to this problematique, not least because they point out that the key to understanding the emergence of colonial despotism is the dilemma of the 'rule of law' and 'emergency'. Political theorists and postcolonial scholars have pointed out that there was no rule of law in the colonies—colonialism was a 'state of exception' where the colonised was debased to the disposable and

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(Basingstoke, 2008); Philip J. Stern, 'Rethinking institutional transformations in the making of modern empire: The East India Company in Madras', *Journal of Colonialism and Colonial History* 9, 2 (2008); James Lees, 'Administrative-scholars and the writing of history in early British India: A review', *Modern Asian Studies*, 48, 3 (2014), 826–43.

<sup>4</sup> Lauren Benton, *Law and colonial cultures: Legal regimes in world history 1400–1900* (Cambridge, 2002); Arthur Mitchell Fraas, 'They have travailed into a wrong latitude': The laws of England, Indian settlements and the British imperial constitution 1726–1773' (Duke Univ. Ph.D thesis, 2011); Gagan D. S. Sood, 'Sovereign justice in precolonial maritime Asia: The case of Mayor's Court of Bombay 1726–1798', *Itinerario* 37, 2 (2013), 46–72; Kristen McKenzie, "'The laws of his own country": Defamation, banishment and the problem of legal pluralism in the 1820s Cape Colony', *JICH*, 43, 5 (2015), 787–806. See also Daniel J. Hulsebosch, *Constituting empire: New York and the transformation of constitutionalism in the Atlantic World 1664–1830* (Chapel Hill, 2005); Lisa Ford, *Settler sovereignty: Jurisdiction and indigenous people in America and Australia 1788–1836* (Cambridge, Mass, 2010); Lauren Benton and Richard J. Ross (eds.), *Legal pluralism and empires 1500–1850* (New York, 2013).

<sup>5</sup> Eric Stokes, *The English utilitarians and India* (Oxford, 1959); Uday Singh Mehta, *Liberalism and empire: A study in nineteenth-century British liberal thought* (Chicago, 1999); Jennifer Pitts, *A turn to empire: The rise of imperial liberalism in Britain and France* (Princeton, 2005); Karuna Mantena, *Alibis of empire: Henry Maine and the ends of liberal imperialism* (Princeton, NJ, 2010).

exterminable ‘bare life’.<sup>6</sup> While some historians of law and empire refute this thesis and argue that the rule of law actually reduced the coerciveness of the British colonial rule,<sup>7</sup> others defend it by emphasising the vast amount of evidence of everyday violence.<sup>8</sup> A more persuasive line of argument is offered by Nasser Hussain, who examines the cases of martial law and suspension of habeas corpus in colonial India and argues that the state of emergency was not outside the rule of law but constitutive of it.<sup>9</sup> Lauren Benton and Mark Condos elaborate this by arguing that the logic of war and emergency was incorporated into a new conception of the rule of law in nineteenth-century colonies; the state of exception in times of conquest was institutionalised in colonial regimes in times of peace.<sup>10</sup>

These works are particularly important as they direct our attention to the relationship between the Indians’ use of law and the changes in the

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<sup>6</sup> Johan Geertsema, ‘Exception, Bare Life and Colonialism’, in Victor V. Ramraj (ed.), *Emergencies and the limits of legality* (Cambridge, 2008), 337–59.

<sup>7</sup> R. W. Kostal, *Jurisprudence of power: Victorian empire and the rule of law* (Oxford, 2005); Martin J. Wiener, *An empire on trial: Race, murder and justice under British rule 1870–1935* (Cambridge, 2009).

<sup>8</sup> Sylvia Vatuk, ‘Bharattee’s death: Domestic slave-women in nineteenth-century Madras’, in Indrani Chatterjee and Richard M. Eaton (eds.), *Slavery and south Asian history* (Bloomington, 2006), 210–33; Steven Pierce and Anupama Rao (eds.), *Discipline and the other body: Correction, corporeality, colonialism* (Durham, NC, 2006); Elizabeth Kolsky, *Colonial justice in Britain: White violence and the rule of law* (Cambridge, 2010); Jonathan Saha, *Law, disorder and the colonial state: Corruption in Burma c.1900* (Basingstoke, 2013); Deana Heath, ‘Bureaucracy, power and violence in colonial India’, in Peter Crooks and Tim Parsons, (eds.), *Empires and bureaucracy from late antiquity to the modern world* (Cambridge, 2016 forthcoming), 180–210.

<sup>9</sup> Nasser Hussain, *The Jurisprudence of emergency: Colonialism and the rule of law* (Ann Arbor 2003).

<sup>10</sup> Lauren Benton, *A search for sovereignty: Law and geography in European empires 1400–1900* (Cambridge, 2010); Mark Nicholas Condos, ‘British military ideology and practice in Punjab c.1849-1920’ (Cambridge Univ. Ph.D thesis, 2013). See also Samera Esmeir, ‘On the coloniality of modern law’, *Critical Analysis of Law*, 2, 1 (2015), 19–41.

colonial institutions. Recent studies of the social history of law attest its importance.<sup>11</sup> Local people's active appropriation of available legal forums and authorities was the common feature in Mughal India.<sup>12</sup> It continued to be so under the British rule. The Indians actively used the court of law in business and demanded new legislations, which led to the remodelling of social and economic institutions.<sup>13</sup> The British court was popular as a means of dispute resolution because the British judges could not understand the details of the cases and the Indian litigants could easily manipulate the result.<sup>14</sup> Thus, the social policy of the colonial government often involved complex and protracted negotiations with the Indian groups, particularly in the realms of family, property, charity and caste.<sup>15</sup> The everyday legal practices of Indians shaped the political culture of particular legal institutions

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<sup>11</sup> In addition to works cited below, see Mitra Sharafi's masterful review of historiography. Mitra Sharafi, 'South Asian legal history', *Annual Review of Law and Social Science*, 11 (2015), 309–36.

<sup>12</sup> Farhat Hasan, *State and locality in Mughal India: Power relations in western India c. 1572–1730* (Cambridge, 2004), especially chapters 5–6.

<sup>13</sup> Niles Brimnes, 'Beyond colonial law: Indigenous litigation and the contestation of property in the Mayor's Court in late eighteenth-century Madras', *Modern Asian Studies*, 37, 3 (2003), 513–50; Tirthankar Roy, 'Indigo and law in colonial India', *Economic History Review*, 64, S1 (2011), 60–75.

<sup>14</sup> Pamela G. Price, 'The "popularity" of the imperial courts of law: Three views of the Anglo-Indian legal encounter', in W. J. Mommsen and J. A. De Moor (eds.), *European expansion and law: The encounter of European and indigenous law in 19<sup>th</sup>- and 20<sup>th</sup>-century Africa and Asia* (Oxford, 1992), 179–200.

<sup>15</sup> Ritu Birla, *Stages of capital: Law, culture and market governance in late colonial India* (Durham, 2009); Hiroyuki Kotani, *Indo shakai bunkashi ron: Dento shakai kara shokuminchi teki kindai e* [Social and cultural history of India: From 'traditional' society to colonial modernity] (Tokyo, 2010); Rachel L. Sturman, *The government of social life in colonial India: Liberalism, religious law and women's rights* (Cambridge, 2012). Through these practices, the identity of the Indians was reshaped. Mattison Mines, 'Courts of laws and styles of self in eighteenth-century Madras: From hybrid to colonial self', *Modern Asian Studies*, 35, 1 (2001), 33–74; Chandra Mallampalli, *Race, religion and law in colonial India: Trials of an interracial family* (Cambridge, 2011); Mitra Sharafi, *Law and identity in colonial south Asia: Parsi legal culture 1772–1947* (Cambridge, 2014).

such as the High Court or the panchayat (indigenous arbitration courts).<sup>16</sup> Attention to forms of agency has shifted the focus of historians from the traditional debate about whether the law was a tool of domination or resistance to the discussion of legal pluralism. Scholars have examined various modes of ‘jurisdictional jockeying’: to resort to another legal authority with overlapping jurisdiction to overturn previous legal decisions. The British officials often conceptualised these attempts as legal ‘abuse’ or ‘corruption’, but scholars have recognised that these acts were also based on indigenous people’s alternative visions of legal orders.<sup>17</sup> In summary, the social, economic and political life of Indians was deeply embedded in the colonial state’s legal framework, and the active participation of the Indians in this ‘self-conscious site of contestation’ produced changes in colonial legal institutions.<sup>18</sup>

The problem of this historiography is that the study of emergency and exception is not well connected to the study of the social history of law. The latter works pay detailed attention to the political nature of everyday legal practices in private spheres, but its relationship with state-level institutional changes is not always explored. As a result, the relationship between the rule of law and emergency has not been sufficiently contextualised, and the driving

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<sup>16</sup> Abhinav Chandrachud, *An independent, colonial judiciary: A history of the Bombay High Court during the British raj 1862–1947* (Oxford, 2015); James Jaffe, *Ironies of colonial governance: Law, custom and justice in colonial India* (Cambridge, 2015).

<sup>17</sup> Taylor C. Sherman, *State violence and punishment in India* (London, 2010); Sandra den Otter, ‘Law, authority and colonial rule’, in Douglas M. Peers and Nandini Gooptu (eds.), *India and the British empire* (Oxford, 2012); Saha, *Law, disorder and the colonial state*; Nandini Chatterjee and Lakshmi Subramanian, ‘Law and the spaces of empire: Introduction to the special issue’, *Journal of Colonialism and Colonial History*, 15, 1 (2014).

<sup>18</sup> Zoë Laidlaw, ‘Breaking Britannia’s bounds? Law, settlers, and space in Britain’s imperial historiography’, *Historical Journal*, 55, 3 (2012), 807–30, quotation at 822.

force of the transformation remains unclear. For example, it has been discussed that the colonial government had a desire to retain the power of discretionary intervention in an emergency, but this is often just assumed by referring to abstract theories of state and state-formation.<sup>19</sup> Some works point out the exceptional difficulty in dealing with ‘criminal tribes’ in Punjab or the North Western Provinces as the context,<sup>20</sup> and certainly, as I also argue in this thesis, the control of tribes was one of the most important kinds of emergencies. But the government’s antipathy to the law was not limited to these overtly exceptional situations but permeated with the everyday civil administration. Relatedly, while Foucauldian scholars have produced rich scholarship on colonial governmentality (internal exertion of power through knowledge), this should not divert our attention from the dimension of sovereignty (external exertion of power through coercion) and officials’ anxiety about it.<sup>21</sup> The British authority was unstable and fractured in this period, and the conflict within the British was as important as the conflict between the British and the Indians in shaping the future form of governance.<sup>22</sup>

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<sup>19</sup> Hussain, *Jurisprudence of emergency*; Mithi Mukherjee, *India in the shadows of empire: A legend and political history 1774–1950* (Oxford, 2009).

<sup>20</sup> Condos, ‘British military ideology’; Elizabeth Kolsky, ‘The colonial rule of law and the legal regime of exception: Frontier “fanaticism” and state violence in British India’, *American Historical Review* 120/4, 2015, 1218–46.

<sup>21</sup> Deana Heath, ‘Bureaucracy, power and violence in colonial India’, in Peter Crooks and Tim Parsons (eds.), *Empires and bureaucracy from late antiquity to the modern world* (Cambridge, 2016 forthcoming), 180–210; Jon Wilson, ‘The Temperament of empire: Law and conquest in late nineteenth century India’, in Gunnel Cederlof and Sanjukta Das Gupta (eds.), *Subject, citizens and law: Colonial and postcolonial India* (London, 2016 forthcoming).

<sup>22</sup> Wilson, *Domination of strangers*; Andrew Sartori, ‘The British empire and its liberal mission’, *Journal of Modern History*, 78, 3 (2006), 623–42; Frederick Cooper and Ann Laura Stoler (eds.), *Tensions of empire: Colonial cultures in a bourgeois world* (Berkeley, CA, 1997); Laidlaw, Zoë, *Colonial connections 1815–45: Patronage, the information revolution and colonial government* (Manchester, 2005).

Particularly problematic is that few studies discuss the relationship between the indigenous participation in jurisdictional jockeying in ordinary society and the institutional changes of the rule of law and emergency. Lauren Benton, the most important scholar on this topic, has pointed out this new direction of study. But regional historians have failed to take up this point seriously and have not engaged in more localised projects of examining the chronological development of jurisdictional politics in particular colonies, which Benton inevitably had to abandon because of the global perspective of her study. As a consequence, the study on the relationship between law, agency, and emergency remains insufficient and the limits of Benton's case studies—for example, she has not pinpointed the reason why the government officials desired to retain the power of discretion in mid-nineteenth-century western India, only suggesting that it was related to 'representations of wilderness and disorder' and 'imagined legal primitiveness' of the Indian states—remained unexplored.<sup>23</sup> Following recent attempts to connect local practices with intellectual history,<sup>24</sup> this thesis tries to fill this gap between the study of the change of legal structure and that of everyday legal practices.

Early nineteenth century Bombay is an ideal example to study this theme, as its King's Court was an institutional embodiment of legal pluralism. It allows us to examine colonial judicial politics from the perspective of interactions between agency and structural change. The King's Court was

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<sup>23</sup> Lauren Benton, 'From international law to imperial constitutions: The problem of quasi-sovereignty 1870–1900', *Law and History Review*, 26, 3 (2008), 612; Benton, *Search for Sovereignty*, chapter 5.

<sup>24</sup> Wilson, *Domination of strangers*; Andrew Sartori, *Bengal in global concept history: Culturalism in the age of capital* (Chicago, 2008); C. A. Bayly, *Recovering liberties: Indian thought in the age of liberalism and empire* (Cambridge, 2012); Andrew Sartori, *Liberalism in empire: An alternative history* (Berkeley, 2014); Vikram Visana. 'Vernacular liberalism, capitalism, and anti-imperialism in the political thought of Dadabhai Naoroji', *Historical Journal*, FirstView article (Jan. 2016), 1–23.



independent of the East India Company. It had jurisdiction over Europeans and Indians in the presidency town of Bombay, while the rural districts (mofussil) were under the jurisdiction of the Company's Court. But the King's Court sometimes insisted on their extended jurisdiction in the mofussil and conflicted with the Company's judicial authority. Indians actively used the King's Court to challenge the government and, by doing so, buttressed the court's legitimacy. The jurisdictional battle between the King's Court and the local government was common in the early nineteenth century in the EIC's presidencies of Calcutta, Madras and the Prince of Wales Island (Penang).<sup>25</sup> The conflict between the government of Warren Hastings and Elijah Impey's Supreme Court in Calcutta in the 1770s was particularly notorious. But, even if the structure of conflict was already manifested in Calcutta in the eighteenth century, I suggest that the conflict in Bombay in the 1820s had the formative effect on the mode of government in India in the rest of the nineteenth century, as it directly stimulated the ministers as well as the Company's directors in London to make a more despotic rule in India.

The central argument of this thesis is that the Indian legal practices of appropriating the jurisdictional conflict led the government to construct a unitary and hierarchical judicial structure, in which the government retained the power of political intervention in judicial affairs in cases of emergency. The background was the political, economic, and social crisis in the mofussil in the 1820s. The main concern of the government in this period was the raid and rebellion of the 'wild tribes' in the hills and their collaboration with the

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<sup>25</sup> For Calcutta, see Travers, *Ideology and empire*, chapter 5; Mukherjee, *India in the shadows of empire*, chapters 1–2. For Madras, see Brimnes, 'Beyond colonial law'; Mines, 'Courts of laws and styles of self'. For the Prince of Wales Island, see Nurfadzilah Yahaya, 'Legal pluralism and the English East India Company in the Straits of Malacca during the early nineteenth century', *Law and History Review*, 33, 4 (2015), 945–64.

Indian princes in the plains. The government tried to deal with it by a form of indirect rule relying on Indian chiefs and aristocrats in the mofussil. But the King's Court obstructed this policy because their subjugation to the court's warrants and writs weakened the authority of the chiefs in local society. Moreover, by overturning the decisions of the Company's Court and trying and punishing governors and other Company officials, the King's Court endangered the Company's authority and sovereignty in the mofussil. The government believed that the King's Court should be subordinated to the paramountcy of the government and the unitary judicial structure should be devised in India. This tension exploded in the habeas corpus case in 1828 and resulted in the official recognition of the Company's despotism in the 1834 charter renewal.

In other words, I contend that the driving force of the transition from hybrid to government-centred colonialism in early nineteenth-century western India was Indian use of the King's Court and the government's anxiety of sovereignty in the aftermath of the conquest. I suggest that the Bombay case represented the pattern of judicial politics in nineteenth-century India, where the British government was involved in the incessant process of conquest, settlement, and strengthening of logic of emergency. The need to cope with the crises at the frontiers of empire put the colonial government under the constant pressure to be ready for emergency measures, which made the overall tenor of the British domination more despotic and emergency-oriented.

The thesis makes the argument in seven chapters. The first two chapters deal with the conflict in Bombay city, and the rest of the chapters examine that in the mofussil, or the provinces of the Deccan, Konkan, and Gujarat. Chapter 1, 4, 5 and 6 relate to criminal justice and police, and Chapter 2 and 3 to civil judicature. By looking at both the presidency towns and the mofussil, and the

civil and the criminal justice, I deal with the problem of the King's Court as broadly as possible.

Chapter 1 examines the emerging structure of conflict between the government and the King's Court by discussing Bombay city's municipal governance, particularly the police. The King's Court exhibited its critical attitude towards the government's arbitrary management of the police. The judges condemned the illegal conviction and punishment by the government's police officers. The government, on the other hand, vindicated the harsh measures by deploying the logic of expediency. It also looks at a similar conflict over the freedom of the press, in which the government's militarist logic of necessity was refuted by the King's Court's civilian perspective of law and society.

Chapter 2 analyses two legal cases in the King's Court in which the government was sued by Indian merchants in Bombay city. The King's Court provided the arena for the Indians to demand the protection of property rights from the government's expropriation. In these two cases, the King's Court judged in favour of the Indian merchants. The government appealed to the Privy Council. The merchants were vehemently defended by radicals in London. But the decisions were reversed. In these cases, the King's Court exhibited a civilian view of Indian society, in which the law and the court held a paramount power, and rebutted the government's militarist perspective of state necessity in times of emergency.

Chapter 3 examines the King's Court's problems in the mofussil. Although its jurisdiction was limited to the presidency town, the King's Court caused various problems in the mofussil. The summons of the Company's district officials hindered their ordinary business. The sheriff's execution of the writs caused disturbances in the mofussil. The most problematic was the

King's Court's interference in the Company's revenue administration. The revenue defaulters used the King's Court to overturn the decree of the Company's Court. The government officials strongly censured the King's Court not only because it disrupted their revenue collection, but also because it meant the denial of the Company's sovereignty embodied in its revenue administration.

Chapters 4 and 5 examine the Bombay government's security concerns in the mofussil caused by the jurisdictional expansion of the King's Court. Chapter 4 discusses the government's policy towards the Indian armed gentry (called the sardars), particularly focusing on the issues of policing in the mofussil. The 1820s was the period of raids and rebellions. Even a British collector was killed in a rebellion in the Deccan in 1824. These insurrections indicated that the troubles were caused by the alliance of 'wild tribes' in the hills with the sardars in the plains. In order to deal with it, the government vested the sardars with police authority to deal with the raiders. In order to uphold the sardars' social influence, the government also exempted them from the Company's Court. By these measures, the government constructed a system of indirect rule in which the affairs of the sardars were excluded from the realm of law and put under the government's exclusive control.

Chapter 5 discusses the way in which the government's policy towards the sardars was obstructed by the King's Court. First, I analyse the cases in which the sardars were subjected to the process of the King's Court by means of summonses and attachments of persons and properties including alienated lands. The sardars complained that they were injurious to their respectability. The government was concerned about the destabilisation of the provinces in which the sardars had curtailed the threat of tribal raids. Second, to make matters worse, the independent princes of Kolhapur, Satara and Baroda started

to rely on the authority of the King's Court to extract political concessions from the government, which meant that the government's paramountcy over these internal and external allies was jeopardised by the King's Court.

Chapter 6 examines the cases of habeas corpus in 1828, which were the culmination of the developments discussed in previous chapters. These cases developed into an open conflict between the two authorities, and the jurisdictional problem was disputed in Bombay, Calcutta, and London. In one case, the writ of habeas corpus was issued to an influential sardar in Poona. In the other case, a revenue defaulter was released from the gaol by the habeas corpus. The government sent a letter to the King's Court to stop the proceedings, while the judges petitioned the Privy Council in Britain to complain about the government's political interference. This event strengthened the government's sense of danger about the King's Court's encroachment on sovereignty in the mofussil. The Bombay government urged the supreme government in Calcutta and the home authorities in London to make a new, unified judicial order in which the judiciary was subjugated to the executive.

Chapter 7 discusses the wider impact of the Bombay cases on the future shape of the Indian governance. The Bombay government's sense of danger was shared by the Company's officials in Calcutta, who had experienced similar conflicts with the King's Court and even with the Company's Court in the 1820s. As the solution, they proposed the establishment of the legislative council in the East India Company's new charter in 1834. The Calcutta judges of the King's Court resisted the diminution of their power, but the home authorities sanctioned it in the debate in London. This was an important moment. The King's Court's power of judicial check was officially curtailed, and the EIC's government was vested with an exclusive and supreme authority

in determining the political affairs in times of emergency.

In the concluding chapter, I consider wider implications of the jurisdictional conflict in India in later years of the nineteenth century. My contention is that the pattern set by the Bombay cases recurred in the later years. The government's sense of danger was always high about the political interference by the judiciary and the Indians' appropriation of it against the backdrop of the repeated process of conquest and post-war settlement in the frontiers. Based on the logic of emergency, the government justified the supremacy of the executive and the subjugation of the judiciary. Furthermore, in order to accommodate the constant state necessities in the frontiers, the government's legal authorities redefined the rule of law itself to be conducive to the state necessity. This further consolidated the subjugation of the realm of law to the realm of politics. At the same time, though, the conflict between the executive and the judiciary never disappeared because they were rooted in the Indians' legal practices.

The main primary sources of this study are the government records (judicial, general/public, revenue, political, and military departments) in the India Office Records, the British Library. They are supplemented by the department files in the Maharashtra State Archives. These records are used to reconstruct the political process in Bombay and to analyse the government's discourse. I also use periodicals and newspapers such as the *Bombay Gazette*, *Bombay Courier*, *Oriental Herald* and *Asiatic Journal*, and other printed sources such as the Privy Council Printed Papers (the British Library), the *Selections of the Records of the Bombay Government*, *British Parliamentary Papers* and *Parliamentary Debates*. The High Court Records in the Maharashtra State Archives (the Recorder's Court Diary and Supreme Court Diary), which contain the proceedings of everyday business in the courts,

could not be consulted. They are not catalogued and currently not accessible to the researchers. Because of this, even such basic information as the number of cases filed in the court is only partially known from some indirect evidence in the government records.<sup>26</sup> On the other hand, the information on the more narrowly ‘political’ problems involving the King’s Court exists in the government records and is fully used in this study.

## II. The logic of law and the logic of emergency

The Bombay controversy highlighted the conflict between the King’s Court’s logic of law and the government’s logic of emergency. I pay a special attention to this conflict in this thesis. Many scholars have applied their definitions of the rule of law and emergency to British India.<sup>27</sup> Mithi Mukherjee analyses similar contrasting views between what she calls ‘the imperial’ and ‘the colonial’.<sup>28</sup> My contention is that these legal concepts should be put in historical contexts and considered with reference to contemporary usages. The following is a summary of the conflicting logics of the government and the King’s Court in Bombay in the 1820s.

The logic of law was the judges’ discourse of legality based on which they claimed the power to check the government’s conduct. It required the government to be ‘lawful’, ‘regular’, and ‘constitutional’. It was based on the

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<sup>26</sup> There were few ordinary transactions between the King’s Court and the government. The court usually only reported the number of incumbent lawyers, table of fees, probates of wills, testaments and administrations, and sentences of convicts for transportation (as they needed to be sent by means of the government’s ships). See indices for Bombay Judicial and General/Public Consultations in BL, IOR.

<sup>27</sup> Nick Cheesman, ‘Rule-of-law lineages in colonial and early post-colonial Burma’, *MAS*, 50, 2 (2016), 564–601; Geertsema, ‘Exception, Bare Life and Colonialism’.

<sup>28</sup> Mukherjee, *India in the shadow of empire*, chapters 1–2.

court's exercise of ordinary jurisdiction, and the logic of constitutional check and balance derived from the British idea of mixed constitution. First, the King's Court assumed the power of trying the Company and its officers as the defendant in an ordinary civil case. Its fundamental assumption was that Indian society was in a civilian, not military, state, one in which the municipal court could exercise its jurisdiction. The judges did not deny the existence of state necessity and emergency in which they did not have jurisdiction, but they assumed that such a situation was extremely rare and insisted that it was not the government but the court that could decide whether a situation was an emergency or not. As a corollary, though they admitted that there might be limitations of political liberty of the Indians, their personal liberty should always be protected by the regular court. The government's liability was claimed by relying on such precedents as Mansfield's judgment in *Mostyn v. Fabrigas* (1775).

This rigid dichotomy between the civil and the military state of society was based on the judges' clear distinction between pre-conquest Indian India and post-conquest British India. They interpreted that once territories were conquered, the state of war ended and the juridical sovereignty of the courts of law was established. Their notion of the law did not allow the in-between state of society between war and peace. By assuming this abrupt transformation from war to peace or from Indian to British society, the judges could argue that the laws of England, alongside with the customs and usages, were immediately applicable to the newly conquered territories. They asserted that Indian society in conquered provinces was an orderly society in which the regular courts of law should dominate, as opposed to the government officials' view of frontiers in which the government should always retain the power of emergency intervention outside the judicial processes.



In addition to the ‘ordinary’ jurisdiction, the King’s Court also claimed its ‘extraordinary’ power to check the government. It was called the ‘*potestas imperii*’, or a ministerial or mandatorial power of the sovereign to rectify judicial errors and misdemeanours. Its foundation was the assumption that the royal charter conferred the judges with the power and authority of the Court of the King’s Bench in Britain. It was exercised by issuing the king’s prerogative writs of *habeas corpus*, *mandamus*, *certiorari*, *prohibition*, or *procedendo*. By this means, the King’s Court reviewed and overturned the government and the Company’s Court’s decisions. The prerogative powers of the King’s Court were vindicated by referring to precedents and legal authorities in the English common law tradition. It included the opinion of Edward Coke in *Calvin’s Case* (1608) and his *Institutes of the Lawes of England* (1628–44). This was supplemented by later authorities such as Mansfield in *R. v. Cowle* (1759) or Eldon in *Crowley’s Case* (1818), together with the Indian judgements such as *R. v. Monisse* (1810).

The judges’ chief weapon against the government was their ‘judicial discretion’ in controlling the procedures in the court. As Michael Lobban shows, the lawyers in the eighteenth century conceived the common law primarily as a system of remedies based on reasoning rather than a set of rules based on theory. They asserted the central importance of the legal procedures, based on which they could deny the validity of plea or reject evidence. Besides, the judges could resort to the reasoning from inside (the most important of which was the precedent) and outside the law (such as public convenience or policy) based on their decision in each case. Their control of the case was strengthened by the fact that the doctrine of *stare decisis* or the absolute necessity to obey the precedent was not established until the

mid-nineteenth century.<sup>29</sup>

The government employed the logic of ‘state necessity’, ‘emergency’, or ‘reason of state’ in its contest with the King’s Court. It was a logic of ‘danger’ and ‘self-preservation’, which enabled the government to act freely in times of emergency without constraints by the judiciary. In this sense, it was firmly embedded in a Western tradition of the idea of reason of state.<sup>30</sup> But the officials’ concern was derived from the crises on the spot. Its backdrop was their belief in the weakness rather than the strength of the British rule in India. They felt the danger in a very tangible way. They thought that they were always jeopardised by not only the Indian rebels but also its sepoys, disobedient native servants, revenue defaulters or even by European settlers and lawyers. For the officials, India was always in a state of crisis.

The officials’ anxiety reflected their assumption that boundaries meant little in India. There were no clear boundaries between war, rebellion, and raid, for, as we shall see in Chapter 4, the gathering of the raiders was often the first step for larger rebellions, which invited the intervention of the foreign princes. The boundary between Indian India and British India was also thin. The British territories were permeated with the internal frontiers, in which the armed rural bosses, in the same way as the foreign rajas, could exert their social control in defiance of the control of the Company’s revenue officers.<sup>31</sup> The boundary between rural areas (mofussil) and cities, even the presidency towns, was also not so clear, because the latter were also always threatened by

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<sup>29</sup> Michael Lobban, *The common law and English jurisprudence 1760–1850* (Oxford, 1991), 1–16, 61–98.

<sup>30</sup> Thomas Poole, *Reason of state: Law, prerogative and empire* (Cambridge, 2015).

<sup>31</sup> Cf. Robert Eric Frykenberg, *Guntur District 1788-1848: A history of local influence and central authority in South India* (Oxford, 1965); David Washbrook, *The emergence of provincial politics: The Madras presidency 1870–1920* (Cambridge, 1976).

the possibility of riots and robberies.<sup>32</sup> In consequence, there was no boundary between war and peace, or that between military and civil societies.

In such a situation, the government officials were concerned about its sovereignty in Karl Schmitt's sense: sovereignty 'not as the monopoly to coerce or to rule, but as the monopoly to decide'.<sup>33</sup> They assumed that the boundaries in society must be determined only by the government. The political matters such as concluding treaties with Indian princes or introducing a separate judiciary in the post-war settlement should be solely decided by the government in reference to 'state policy'. The courts of law should not have any say about them. The government did not deny the role of law altogether—the separate judiciary was necessary to absolve collectors from judicial businesses and to ensure efficient revenue collection. The political liberty of the Indians might be utterly denied, but their personal liberty might or might not be limited by the government in reference to necessities. What was problematic was that the government's political decisions were hindered by the judges' power to try and decide politically important cases in the court.

Because of this, the government officials disliked the common law's technicalities of procedures and precedents, which were the source of the judges' power to control the court. So, it was natural for them to resort to the other major source of law: legislation.<sup>34</sup> Mountstuart Elphinstone, the governor of Bombay, was clearly a Benthamite in this sense.<sup>35</sup> He compiled a comprehensive set of regulations, commonly called the Elphinstone code,

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<sup>32</sup> See Chapter 1. Cf. C. A. Bayly, *Rulers, townsmen and bazaars: North India in the age of British expansion 1770–1870* (Oxford, 1997), chapter 8.

<sup>33</sup> Quoted in Hussain, *Jurisprudence of emergency*, 20.

<sup>34</sup> Cf. William Cornish, et al. (eds.), *Oxford history of the laws of England: Volume XI 1820–1914* (Oxford, 2010), chapter 3 'sources of law', 41–71.

<sup>35</sup> Though Elphinstone thought that he was not a 'Jeremy Benthamist'. Kenneth Ballhatchet, *Social policy and social change in western India 1817–1830* (London, 1957), 34–6.

comprising constitutional, civil, criminal, revenue and military branches—Bombay's pannomion. It contained stipulations clearly referring to the 'reasons of state'. The next governor John Malcolm also advocated this code. By this means, the government tried to limit the role of the judges to the simple application of the code and to assert its superiority to the King's Court without overtly denying the importance of the law in colonial governance. From this perspective, the government's deployment of the logic of state necessity was a Hobbesian moment in Indian history because, as opposed to Coke's and the King's Court's view of law as reason and remedy, the government's view of law was similar to that of Hobbes: the law as the command of the sovereign.<sup>36</sup> At the same time, though, it should be emphasised that the government officials' sense of crisis and their solutions were more influenced by the local conditions of Indian society and their experience of governing them than by their understanding of Coke, Hobbes, or Bentham.

Because of this deep divide between the two logics, the conflict between the King's Court and the government transcended the boundary of Bombay and provoked an imperial dispute on the law and politics in the British colonial governance.

### III. The structure of the King's Court and the conflicts in the eighteenth century

The rest of this Introduction describes the basic structure and actors of the King's Court and the Company's Court, and the prehistory of the judicial politics in Bombay in the early nineteenth century.

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<sup>36</sup> Lobban, *Common law*, 4.

The jurisdictions of the King's Court and the Company's Court were demarcated geographically and personally. The King's Court, situated in the present-day Hornby House, Apollo Street, had jurisdiction over the British subjects in Bombay city and in the mofussil and Indians in Bombay city. The Indians employed by the Europeans or by the Company were also amenable to the King's Court. The Indians in the mofussil were under the jurisdiction of the Company's Court. The King's Court applied English common and statute laws. It also applied Hindu or Muslim private laws when the defendant of civil actions was a Hindu or a Muslim inhabitant. The Company's Court applied 'regulations' legislated by the governor in council, Hindu and Muslim civil laws in cases between Hindu or Muslim parties, and other laws of customs in cases of other Indian subjects.<sup>37</sup> A case could be appealed to the Privy Council in Britain from both of the courts.

The King's Court was characterised by its multiplicity of jurisdictions. The court functioned as the common law court, the equity court, the ecclesiastical court, and the admiralty court. It also constituted the small cause court and the court of enquiry. A chief justice and two puisne judges were appointed by the royal charter. They were entitled to a pension in Britain after five, seven or ten years' service, though they usually died too quickly to receive it.<sup>38</sup> The salary of the chief justice and puisne judge were Rs 60,000 and 50,000 per annum in 1827, which was higher than any of the civil officers in the presidency other than the governor and the members of the council.<sup>39</sup>

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<sup>37</sup> The Muslim criminal law, which was applied in Bengal and Madras, was suspended in Bombay.

<sup>38</sup> Peter Auber, *An analysis of the constitution of the East-India Company, and of the laws passed by parliament for the government of their affairs, at home and abroad* (London, 1826), 559–62. Between 1800 and 1830, only James Mackintosh could live longer enough to return home and receive pension.

<sup>39</sup> The governor was paid Rs 1,43,500 per annum, the commander in chief Rs

They were sometimes accompanied by their relatives and exchanged personal correspondence with judges in other presidencies.<sup>40</sup>

The court was given civil, criminal and ecclesiastical jurisdictions in Bombay city. A legal year comprised 4 terms (5–26 February, 1–21 April, 20 June–11 July and 10 September–1 October) of 19 days each, excluding Sundays, Thursdays, alternate Mondays and Hindu holidays. The court had jurisdiction over all criminal cases of Company's servants and all other British subjects as a court of oyer and terminer (i.e. vested with the power to try treason and felony), and gaol delivery (empowered to try every prisoner in gaol). The criminal sessions were also held four times a year (26 January, 25 April, 24 July and 14 October), for about 8 days each.<sup>41</sup> The charter provided that a 'convenient number' of jurors sat at the sessions of oyer and terminer and gaol delivery as the grand jury, which investigated the evidence and decided whether accused was to be indicted or not. It was summoned by the sheriff from the British inhabitants of Bombay city. In 1828, for example, it was composed of 22 or 23 jurors, of which 10–14 were private merchants, 4–8 were EIC's civil servants, and 2–6 were from the military (all from the Bombay Marine).<sup>42</sup> Each session tried about 7–14 cases of indictment.<sup>43</sup> The sheriff also summoned the petit jury, which heard the evidence and gave verdict that the accused was guilty or not guilty. The governor, members of the council and other government officers were exempted from summonses

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77,500, and other members of the council Rs 60,000. The judges of the sadr adalat were paid Rs 40,000 per annum. PP 1830 (633), 218–9.

<sup>40</sup> Edward West was accompanied with his nephew Martin West, who became register, sealer and deputy clerk of the court. West corresponded with Charles Edward Grey, the chief justice of Calcutta. Drewitt, *Memoir of Edward West*, 49.

<sup>41</sup> PP 1845 (272), 52, footnote.

<sup>42</sup> BL, SM44, *Bombay Gazette*, 2 Feb. 1825, 30 Apr. 1828, 30 July 1828, 22 Oct. 1828.

<sup>43</sup> BL, SM 44, *Bombay Gazette*, 3 Aug. 1825, 19 Oct. 1825, 26 Apr. 1828.

when the jury trial in civil cases was introduced by the Juries in India Act of 1828.<sup>44</sup> As we saw in Chapter 3, this government officers' summons to the juries became a major point of conflict between the government and the court in the 1820s.

The writ of the court was executed by the sheriff and his officers in the same way as in Britain. The sheriff was appointed yearly by the governor and council.<sup>45</sup> Sheriff's gaol or criminal department was composed of a deputy sheriff, a gaoler, a deputy gaoler, and peons and other native officers, and his civil department was of a bailiff and peons and other native officers.<sup>46</sup> In the following chapter's cases, his officers' activities in the mofussil were the focus of officials' resentment. On a complaint of anyone against a person in the court's jurisdiction, the court issued a summons to appear at a given time and place. In default of appearance, the court issued a warrant to the sheriff to bring the defendant before the court. The defendant was to be detained in custody, unless bail might be allowed. Then, after the judgement was given, the defendant was imprisoned until the judgement was fulfilled.<sup>47</sup> Apart from ordinary writ processes in civil and criminal judicature, as already pointed out, the judges of the King's Court also issued the prerogative writs at their discretion.<sup>48</sup>

The number of cases tried in the Supreme Court seems to have been

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<sup>44</sup> 30 inhabitants were summoned as grand jurors and 48 as petit jurors. *Asiatic Journal*, 26 (1828), 616.

<sup>45</sup> William Hook Morley, *An analytical digest of all the reported cases decided in the Supreme Courts of Judicature in India, in the courts of the Hon. East India Company, and on appeal from India, by Her Majesty in Council. With an introduction, notes ... and an appendix*, 2 vols. (London, 1849–50), ii. 648–9, Supreme Court Charter, s. 20.

<sup>46</sup> PP 1847 (14), 26.

<sup>47</sup> M. P. Jain, *Outlines of Indian legal and constitutional history* (6th edition, New Delhi, 2006), 37. Cf. J. H. Baker, *An introduction to English legal history* (4th edition, London, 2002), chapter 4: 'The forms of action'.

<sup>48</sup> Cf. Morley, *Digest*, i. 'jurisdiction'.

relatively small.<sup>49</sup> The yearly average number of cases filed in the plea side of the court in the 1830s was 24.4.<sup>50</sup> The number of defended and undefended cases (ex-parte and cognovits) tried on the plea side and in the small cause court (debts under Rs 360) between 1840 and 1842 was as follows:<sup>51</sup>

<u>Plea side</u>	<u>1840</u>	<u>1841</u>	<u>1842</u>
Defended cases <sup>52</sup>	27	23	42
Undefended cases	7	9	13
Total	34	32	55

  

<u>Small cause court</u>	<u>1840</u>	<u>1841</u>	<u>1842</u>
Defended cases	116	98	87
Undefended cases	527	555	560
Total	643	653	647

The small cause court was used more frequently in the 1820s. In the four years between 1824 and 1827 the court took total 5,465 cases, the annual average of which (1,366) was twice higher than the above.<sup>53</sup> The number of decrees made in equity side was as follows:<sup>54</sup>

<u>Equity side</u>	<u>1840</u>	<u>1841</u>	<u>1842</u>
Decree on agreement	7	18	15
Decree by consent	6	-	3

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<sup>49</sup> We could not know the number for the 1820s without access to the High Court Record in the Maharashtra State Archives. The government record did not contain the information.

<sup>50</sup> PP 1847 (14), 278.

<sup>51</sup> PP 1845 (272), 51. These numbers were smaller than those in the 18th century provided by Mitch Fraas: 89 (1727–9), 82 (1744), 22 (1755), 80 (1766). Fraas, ““They have travailed into a wrong latitude””, 184–5, 385.

<sup>52</sup> The number in Calcutta was 82, 60, and 79; Madras 13, 16, and 20. PP 1847 (14), 278.

<sup>53</sup> PP 1829 (205), 3. Perry noted that the number of cases filed in 1840–3 was 20 percent lower than the 10 years of 1830s. PP 1845 (272), 52, footnote.

<sup>54</sup> PP 1845 (272), 52; *Bombay Almanac and Calendar* (Bombay, 1828), 140.



Total	13	18	18
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The cost of making suits in the court could be expensive. It was often pointed out by contemporaries that the fees were high, especially in cases of equity where large sums of money were involved.<sup>55</sup> Fees were noticed in periodicals such as the *Bombay Calendar and Almanac*. Between 1840 and 1842, the average costs of suing on the plea side were about Rs 1,200 for defended cases and 450 and 189 for ex-parte and cognovits causes.<sup>56</sup> The cases in the small cause court cost average Rs 37 for plaintiff and Rs 13 for defendant in defended cases and Rs 41 and 12 in undefended cases.<sup>57</sup>

The court was run by 20–30 European officers.<sup>58</sup> They were highly paid, as they could expect a large amount of fees and charges in addition to salaries.<sup>59</sup> For example, Barrister William Fenwick could earn fees average Rs 30,000 per annum in the late 1820s as the master of inquiry and the clerk of the small cause court in addition to the salaries of Rs 6,300 and 1,200 respectively. Martin West earned fees and emoluments Rs 27,500 per annum as the registrar of the ecclesiastical side and Rs 6,100 as the sealer in addition to the salary Rs 4,000 as the examiner on the equity side and as the deputy

<sup>55</sup> See, for instance, Chief Justice E. H. East's testimony in PP 1830 (646), 81–2, 138–40, E. H. East, evidence, 9 and 23 Mar. 1830.

<sup>56</sup> PP 1845 (272), 52. Henry Roper calculated the amount as 800, 192 and 147. See PP 1847 (14), 769–88, especially a table in 772.

<sup>57</sup> PP, 1845 (272), 53.

<sup>58</sup> The list of each year's officers was printed in registers such as *Bombay Calendar and Almanac* (Bombay) and *East India Registers* (London).

<sup>59</sup> For the list, see PP 1847 (14), 33. According to this, the annual average of income from salaries and fees were as follows: master in inquiry Rs 16,138 (salary: Rs 6,300); prothonotary, also as register on the equity and admiralty sides, Rs 21,323 (none); ecclesiastical register Rs 21,302 (none); sheriff Rs. 14,301 (Rs 4,200); clerk of the small cause Rs 13,645 (Rs 1,200); clerk of the crown Rs 7,653 (Rs 6,300); chief translator and interpreter Rs. 7,200 (Rs 7,200); attorney for paupers Rs 4,553 (Rs 6,000).

clerk of the court.<sup>60</sup> So the court officials were among the most affluent Europeans in the presidency town. Besides these highly paid European officials, the court also employed a large number of Indian officials. The number of Indian clerks, writers and servants counted 630 in 1827.<sup>61</sup> Some of them were well paid. For example, the native assistant translator in Gujarati, Marathi and Marwari was paid Rs 4,080 per annum, the assistant translator in Arabic and Persian Rs. 1,200/a, the native transcriber Rs 360/a. Peons were paid Rs 7/m or 84/a.<sup>62</sup>

The judges were somewhat isolated figures in the presidency town. This was especially so in the Recorder's Court, in which the single judge could not expect support from his fellow judges as in Calcutta.<sup>63</sup> The experience of the recorder James Mackintosh attests this. He arrived at Bombay in 1804. He was eager for reforms of police, penal law and prison in Bombay as well as in Britain. But this reformist outlook, particularly his opposition to death penalty, offended the British residents.<sup>64</sup> The trial of Robert Henshaw in 1805 had widened the gap between him and the locals.<sup>65</sup> Robert Henshaw, the custom master of the Bombay government, was responsible for controlling the embargo of grain during the famine of 1802–4 as a member of the

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<sup>60</sup> PP 1829 (205), 2–7.

<sup>61</sup> PP 1830 (633), 257.

<sup>62</sup> PP 1829 (205), 11.

<sup>63</sup> Frederic Dawtrey Drewitt, *Bombay in the days of George IV: Memoirs of Sir Edward West, with hitherto unpublished documents* (2nd edition, London, 1935), 11.

<sup>64</sup> He was sympathetic to Samuel Romilly's cause of criminal law reform, especially of the abolition of the capital punishment, and he exchanged letters during his stay in Bombay with Basil Montagu, lawyer, who founded the Capital Punishment Society in London in 1808. Robert James Mackintosh, *Memoirs of the life of the Right Honourable Sir James Mackintosh* (Boston, 1853), ii. 34.

<sup>65</sup> *Asiatic Journal*, 15 (New Series, 1834), 282. Christopher J. Finlay, 'Mackintosh, Sir James, of Kyllachy (1765–1832)', *ODNB*; online edn, Jan. 2010 [<http://www.oxforddnb.com/view/article/17620>, accessed 23 Jan. 2016].

government's Grain Committee. But he was accused of granting illegal permits to import greater amounts of grains and to export from the Company's stock, and of having received Rs 4,000 as a present. Mackintosh judged him guilty, but the decision was widely resented by the British public of Bombay city.<sup>66</sup> He loathed the factious nature of the small society, and felt that the distance between 'the sentiments of the people here and mine are so great that I see no means of doing good. I came with an enthusiastic hope of doing something beneficial. But I am thwarted in everything and I must content myself with the bare performance of my duty'.<sup>67</sup> He recollected that he was treated 'in the grossest manner. There was no liberal public opinion to support me, and no firm government to frown down indecent reflections on the administration of justice. All this ... disgusted and almost silenced me for a time...'.<sup>68</sup>

All barristers and solicitors in Bombay city in this period were Europeans. Before 1834, they needed to acquire a licence from the Court of Directors to enter and practice as a lawyer in India. The barristers came from Inns of Court in London, while there was no qualification for solicitors. Their number was small, though the late 1820s were marked by the increase of the number of attorneys, probably the reflection of the expanding prospect of business in the mofussil. The number of lawyers in each year was as follows:<sup>69</sup>

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<sup>66</sup> Mariam Dossal, 'Bombay and the famine of 1803–6: The food supply and public order of a colonial port city', in Frank Broeze (ed.), *Gateways of Asia: Port cities of Asia in the 13th–20th centuries* (London, 1997), 127–48.

<sup>67</sup> BL, Add. Mss 52451A, 39, quoted in Andrew Thomas Goodall, 'Politics and history in England 1793–1832: Sir James Mackintosh and his critics' (Sussex Univ. D.Phil thesis, 2009), 95.

<sup>68</sup> Quoted in Robert James Mackintosh, *Memoirs of the life of the Right Honourable Sir James Mackintosh* (Boston, 1853), i. 271.

<sup>69</sup> *East India register and directory*.

	1817	1818	1819	1820	1821	1822	1823	1824
Barrister	3	4	5	5	5	5	6	6
Attorney	6	7	7	7	7	6	6	6

  

	1825	1826	1827	1828	1829	1830	1831	1832
Barrister	7	7	8	8	9	9	8	8
Attorney	10	14	16	15	14	15	11	11

Part of the government's legal business was conducted by the lawyers employed among these private lawyers. The Bombay government employed two legal officers as its legal agent in the court as well as for their legal knowledge. One was the Advocate General (called the Company's Standing Counsel till 1806) employed from the barristers in the presidency. He represented the Company when it was civilly sued in the King's Court. He also filed criminal information to prosecute the suspects in the King's Court. The first Advocate General was Stuart Moncrieff Threipland appointed in 1807.<sup>70</sup> The other was the Company's Solicitor. In addition to duties as a solicitor to the Company as a party in a suit, he mediated communication between the Company and the Advocate General at an early stage. Their salaries were Rs 19,200 and 14,400 respectively in 1830.<sup>71</sup> It was not self-evident that they were all pro-government. For example, such Advocates General as Ollyet Woodhouse or George Macklin were sometimes critical of the government's judicial policy. More generally, it is often difficult to assume that a particular opinion expressed in the court reflected the political beliefs of the lawyer.<sup>72</sup>

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<sup>70</sup> P. B. Vachha, *Famous judges, lawyers and cases of Bombay: A judicial history of Bombay during the British period* (Bombay, 1962), 25.

<sup>71</sup> PP 1830 (633), 234–5.

<sup>72</sup> Mitra Sharafi, 'A new history of colonial lawyering: Likhovski and legal identities in the British empire', *Law and Social Inquiry*, 32, 4 (2007),

Nonetheless, a cleavage appeared between the barristers and the attorneys in the 1820s. The majority of the barristers led by Advocate Generals George Norton and G. C. Irwin were firmly in support of the government. Barrister James Morley was the important exception, who constantly annoyed the government. He was the only barrister who had not been called to an inn of court. On the other hand, the attorneys of the court were often in support of the recorder/chief justice. Most conspicuous among them were Frederick Ayrton, Thomas W. Browne and William Fenwick.

The conflict became manifest when the barristers submitted a memorial criticising the recorder in 1823, and the recorder suspended the barristers from appearing in the court. The barristers criticised the recorder's management of the small cause court, in which the attorneys were allowed to act as barristers and the parties could plead their cause by themselves to reduce the litigants' cost. The barristers criticised that this was the infringement of their right and doubted the legality of the court itself. They submitted a memorial to the court containing some insinuation on the 'most unworthy motives' of the recorder not to abolish the court. The court unanimously suspended the five barristers (i.e. all the barristers in Bombay except James Morley) who signed the memorial for six months.<sup>73</sup> This conflict between the government and barristers, on the one hand, and the King's Court and its attorneys, on the other, formed part of the basic political structure in Bombay in the 1820s.<sup>74</sup>

It is convenient here to pay attention to the structure of the Company's Court.

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1059–94.

<sup>73</sup> *Asiatic Journal*, new series, 16 (1835), 5–8.

<sup>74</sup> Attorneys in Calcutta were similarly involved in conflicts with the government. Tarit Kumar Mukherji, 'Aldermen and attorneys: Mayor's Court, Calcutta', in A. J. R. Russell-Wood (ed.), *Local government in European overseas empires 1450–1800* (1950; Aldershot, 1999).

In the 1820s, there were broadly two types of Company's legal system. I first explain the system in the Old Provinces of Gujarat and the Konkan and then the Deccan system. In the Old Provinces, the Company's Court had jurisdiction in the mofussil, or the provinces outside Bombay city. Its European judges were the Company's civil servants. The structure of the Company's Court was three-tiered. The panchayat was at the bottom of the mofussil justice. The second tier was the zilla court presided by the European judicial officers of the Company. The final courts of justice in Bombay were the sadr diwani adalat (civil) and the sadr foudari adalat (criminal). An appeal was allowed from there to the Privy Council.

The sadr adalat was run by three or more judges, a register, assistant registers, and Hindu and Muslim law officers. Until 1821, the governor and the member of the council had been the final tribunal of the civil and criminal appeal cases. The separation of the executive and the judiciary occurred in that year when Elphinstone recommended the split in order to relieve the judicial burden on the executive.<sup>75</sup> At that time, the location of the sadr adalat was moved from Bombay to Surat in 1821, but it was returned from Surat to Bombay in 1828. The zilla court of civil, criminal and police jurisdictions was filled with Company officials appointed as a judge (denominated as a criminal judge in the criminal court), a senior assistant judge, a junior assistant judge, a register, an assistant register, sadr ameens and native commissioners. Each establishment held 500–2,500 Indian servants, which was generally larger than that of the collectors'.<sup>76</sup>

There were 6 districts or *zillas* in the presidency which were

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<sup>75</sup> Orby Mootham, *The East India Company's sadar courts 1801–1834* (Bombay, 1983), 120.

<sup>76</sup> Usually the number of Indians employed in collectors' establishments did not exceed 1,000. See PP 1830 (633), 252–9.

incorporated in the jurisdiction of the Company's Court between 1818 and 1826: Surat, Broach (incorporated in Surat and Kaira in 1827), Kaira (Eastern Zilla North of the Myhee), Ahmedabad (Western Zilla North of the Myhee), Northern Konkan, and Southern Konkan. The court of circuit was held at each sadr stations by one of sadr judges in rotation to try serious crimes. It was held quarterly in Surat and half-yearly in other zillas.<sup>77</sup> The court was kept open on all days except on Sundays and Christian, Hindu, and Muslim holidays. In the presidency town of Bombay, the Company's senior magistrate of police also exercised revenue jurisdiction.<sup>78</sup> The arbitration panchayat could be presided over by anyone, but the head of village, Indian revenue officers and the native commissioners of the zilla courts could not decline it. The collector was vested with jurisdiction over the revenue matters, which was appealable to the zilla judges. This system was introduced in the Konkan and Gujarat immediately after the conquest of these territories.

The Deccan had a different system. First, the Bombay government tried to retain the Maratha system of justice intact as far as possible. The focus of this effort was the traditional village arbitration court called panchayat. Elphinstone ordered that all civil cases were to be referred to the panchayat, whose decision was final unless there was gross error or corruption. But, as James Jaffe shows, its inefficiency soon became clear. Its procedures were dilatory, its members were difficult to find, and it was plagued by bribery and corruption. As a result, the cases decided in the panchayat comprised less than 5 percent of the total cases in 1819–27, and its status was eventually downgraded to an investigatory body assisting the judges.<sup>79</sup> The role of the

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<sup>77</sup> The tour commenced on 1 January, 1 April, 1 July and 1 October in Surat, and 1 March and 1 October in other zillas.

<sup>78</sup> Regulation III of 1815; Regulation XIX of 1827, ss. 6–8.

<sup>79</sup> Jaffe, *Ironies of colonial governance*, 57, table 2-2.

panchayat was being replaced by more regular works of Indian subordinate judges and magistrates.

Second, the commissioner, collectors and their subordinate Indian officers all combined the executive, judicial and magisterial duties in the Deccan. In other words, the rule of law in terms of the separation of the judiciary from the executive was not introduced in the Deccan after the conquest in 1818. In the rural areas, the mamlatdars (Indian revenue officers) were in charge of minor civil and criminal cases. In urban areas, civil magistrates called amins and munsifs tried similar small cases. The collectors tried serious crimes aided by Hindu law officers (shastris) and appeal cases from Indian subordinate judges. The Deccan Commissioner supervised all of this judicial apparatus in the Deccan. He received appeals from the collectors' courts and solely in charge of the claims against the sardars.<sup>80</sup> But the judicial business put pressure on the officers' revenue collection, and the government needed to think about introducing a separate judiciary. Eventually, judges were introduced and Zillas of Ahmednagar (including Khandesh) and Poona (including Sholapur) were established in 1825 and the Commissioner was abolished in 1826.<sup>81</sup> The debate on the transfer to the civil government was, as we shall see in Chapter 4, much influenced by the social and political crises of the mid-1820s.

The King's Court emerged out of the necessity of commerce at the presidency towns. The Company needed a court in which the Company could sue and be

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<sup>80</sup> For the judicial system in the Deccan, see *Poona gazetteer*, iii. 19–24; Jaffe, *Ironies of colonial governance*, chapters 1–3; Ballhatchet, *Social policy*, 193–213.

<sup>81</sup> Part of the Southern Maratha Country were included in the Regulation area in 1830 and called the Zilla of Dharwar.



sued for its commercial transactions.<sup>82</sup> Moreover, the servants of the EIC could derive benefit from such a court of law in their commercial transactions as private ‘country’ traders.<sup>83</sup> The Royal Charter of 1726 empowered the Company to establish new courts of law with civil jurisdiction in Calcutta, Madras and Bombay, and accordingly the Company established the Mayor’s Courts in the presidency towns.<sup>84</sup> It was a court of record, composed of a mayor and nine aldermen.<sup>85</sup> It had civil jurisdiction of all cases in Bombay city, including the cases between Indians. The court was used by both European and Indian merchants in their business transactions. Indian business of community of all descriptions—Hindus, Muslims, and especially the Parsis—proved very adept at using the court in their business of money-lending or long-distant trade with Bengal or China. They used the court to recover debts, to retain their assets, to restore reputation and to prevent division of business property, as well as simply to harass their rivals, despite the fact that the court’s orders such as to produce account books or to deposit a large amount of bail were potentially harmful to their creditworthiness.<sup>86</sup> A significant context was the insecurity of coastal trade due to piratical raids by northern and southern coastal chieftains, which

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<sup>82</sup> PP 1831 (320E), 112–3, Calcutta Supreme Court [hereafter Cal. SC] to Ben. Gov., 13 Sep. 1830 (no. 26), enclosure 2.

<sup>83</sup> Cf. Lakshmi Subramanian, ‘Seths and sahibs: Negotiated relationships between indigenous capital and the East India Company’, in H. V. Bowen, Elizabeth Mancke, and John G. Reid (eds.), *Britain’s oceanic empire: Atlantic and Indian ocean worlds c. 1550–1850* (Cambridge, 2012), 311–39.

<sup>84</sup> A case could be appealed to the governor in council, and then to the King in Council. At this time, the criminal jurisdiction was vested with the governor and council who constituted the court of oyer and terminer. Morley, *Administration of justice*, 6–8; Jain, *Outlines*, chapter 6.

<sup>85</sup> Two of them could be foreign subjects. S. M. Edwardes (ed.), *Gazetteer of Bombay City and Island [City gazetteer]*, 3 vols. (Bombay, 1909), ii. 213.

<sup>86</sup> Sheila Smith, ‘Fortune and failure: The survival of family firm in eighteenth-century India’, *Business History*, 35, 4 (1993), 44–65. See also Brimnes, ‘Beyond colonial law’.

increased cases of insurance and ‘respondentia’ (loan upon cargoes to be paid only when the goods arrived safely).<sup>87</sup>

The King’s Court caused frictions in Bombay in the eighteenth century, reflecting the Company’s unstable relationship with the private merchants. In the eighteenth century, the government could not monopolise the political authority in the face of the powerful British private merchants in the port city.<sup>88</sup> In the Mayor’s Court, the amateur ‘merchant-judges’ represented the commercial interests and asserted their independence from the government, and a series of conflicts ensued.<sup>89</sup> Even in the early nineteenth century, though no more ‘a puppet in the hands of the great “country” traders’,<sup>90</sup> the governorship of Jonathan Duncan (1795–1811) was still characterised by its weakness and concession to the private merchants.<sup>91</sup> The King’s Court represented the voices of merchants who asserted their autonomy from the government.<sup>92</sup> Besides, the King’s Court jeopardised the Company’s rule by enforcing English court procedures in defiance of Indian religions and customs and provoking resentment among the Indian population. For example, in 1730, a Hindu woman, who converted to Christianity and whose son fled to a relative, sued the relative in the court. The relative complained to the

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<sup>87</sup> Subramanian, ‘Seths and sahib’.

<sup>88</sup> Pamela Nightingale, *Trade and empire in western India, 1784–1806* (Cambridge, 1970); Lakshmi Subramanian, *Indigenous capital and imperial expansion: Bombay, Surat and the west coast* (Delhi, 1996); Holden Furber, *John Company at work: A study of European expansion in India in the late eighteenth century* (London, 1948).

<sup>89</sup> *City gazetteer*, ii. 215–9.

<sup>90</sup> Furber, *John Company at work*, 219.

<sup>91</sup> Pamela Nightingale, ‘Duncan, Jonathan (bap. 1756, d. 1811)’, *ODNB*; online edn, May 2009 [<http://www.oxforddnb.com/view/article/8224>, accessed 23 Jan. 2016].

<sup>92</sup> Gagan D. S. Sood, ‘Sovereign justice in precolonial maritime Asia: The case of Mayor’s Court of Bombay 1726–1798’, *Itinerario*, 37, 2 (2013), 46–72.

governor. The governor warned the court that it could not take cognizance of affairs of religion and caste, but the court strongly protested that it could.<sup>93</sup> The Hindu sensitivity was also injured by the so-called 'cow-oath', by which all Hindu witnesses were made to take hold of a cow's tail and swear to tell the truth in the court.<sup>94</sup> The conflict ensued, and eventually, the Charter of 1756 weakened the Mayor's Court by giving the governor and council the power to nominate the mayor and aldermen and depriving it of its jurisdiction over the cases between the Indians.<sup>95</sup>

The conflict between the court and the government was exacerbated in the late eighteenth century. The amateur merchant-judges of the Mayor's Court could not deal with legally intricate issues which were increased by the growth of population and trade of the presidency towns of Bombay and Madras. The need of professional judges was petitioned by the Madras government to the Court of Directors in 1791, and the British parliament enacted an Act (37 Geo. 3, c.142) enabling the Crown to establish a new court of law in the presidency towns. Accordingly, the Recorder's Courts at Bombay and Madras were established in 1798 by a royal charter. It was also composed of a mayor and three aldermen, but presided over by a Recorder, a professional barrister of five or more years' experience. The court was vested with civil, criminal, ecclesiastical and admiralty (but not revenue) jurisdictions over all the inhabitants in the presidency towns and over the Europeans in the mofussil, except the governor and the council.<sup>96</sup> The court

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<sup>93</sup> Jain, *Outlines*, 40.

<sup>94</sup> *City gazetteer*, ii. 216–7. The government reported it to the Court of Directors in 1746, and it was abolished in the next year.

<sup>95</sup> Jain, *Outlines*, 43.

<sup>96</sup> *City gazetteer*, 213–29; Jain, *Outlines*, 102–3. But the governor and council were amenable to the court as *ex-officio* justices of the peace and as the members of the quarter sessions. Morley, *Digest*, ii. 461, F. Warden report, 15

soon started insisting on its role as a constitutional check against the East India Company.

The battle between the government and the Recorder's Court was part of a wider conflict between the executive and the judiciary over the King's Court's jurisdiction in the mofussil, in which the ideas of the rule of law and emergency became conspicuously conflicted with each other. As Stern argues, the Company had developed an idea that oriental despotism rather than the British rule of law was a fit mode of justice in India even in the seventeenth and early-eighteenth centuries, chiefly in its battle with maritime interlopers.<sup>97</sup> But the territorial acquisition of the Company after the grant of *diwani* in Bengal in 1765 significantly strengthened this tendency. Naturally, the problem became manifested first in Bengal, which is examined in detail by such scholars as Robert Travers and M. P. Jain. The Supreme Court of Calcutta was established in 1774, and it immediately started to interfere in the Company's governance in the mofussil. The Supreme Court took cognizance of Indians' complaints against the servants of Nawab Nizam and the Nawab himself; it also took cognizance of complaints against the Company's revenue officers and issued writs of habeas corpus to liberate those who were confined for non-payment of revenue. The conflict in Calcutta exploded in the so-called Patna case of 1779, in which the Supreme Court overturned the decree of the Company's Court and ruled in favour of a widow of a zamindar who filed a suit against the Company's Muslim law officers. The Patna case was followed by a more open conflict in a banker's case against the zamindar of Cossijurah, in which the Supreme Court ruled in favour of the banker, issued writs of

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Nov. 1810.

<sup>97</sup> Philip J. Stern, *The company-state: Corporate sovereignty and the early modern foundations of the British empire in India* (New York, 2011).

capias and sequestration against the zamindar, and sent a small force to execute the writ. The government also sent an army and prevented it. These conflicts exposed the problem of the Supreme Court's interference in the mofussil, and the Act of Settlement in 1781 (21 Geo. 3, c. 70) provided that the Supreme Court did not have jurisdiction over the revenue affairs, over the zamindars or revenue farmers, and over the official duties of the Company's servants.<sup>98</sup> These Bengal conflicts were exported to Britain by Edmund Burke as his impeachment trial of Warren Hastings. Burke attacked Hastings by vindicating the Indian law, property and nobility—in the same way as he did in his defence of the British constitution in the aftermath of the French Revolution—, while Hastings defended his acts in India as acts of state necessity.<sup>99</sup>

In Bombay, this conflict became apparent when the government acquired territories in the mofussil in the early nineteenth century. In the eighteenth century, the Company was dominated by the political, social and economic influence of the European and Indian merchants. For example, as Lakshmi Subramanian shows, the powerful merchants could compel the government to protect them in the Mayor's Court.<sup>100</sup> But, the acquisition of the inner territories, first in Gujarat in 1803–5 and then in the Deccan in

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<sup>98</sup> Travers, *Ideology and empire*, chapter 5; Jain, *Outlines*, chapter 8; A. C. Banerjee, *English law in India* (New Delhi, 1984), chapter 1; Chittaranjan Sinha, *The Indian civil judiciary in making 1800–1833* (New Delhi, 1971), 162–9.

<sup>99</sup> P. J. Marshall, *The impeachment of Warren Hastings* (London, 1965); Nicholas B. Dirks, *The scandal of empire: India and the creation of imperial Britain* (Cambridge, Mass., 2006); Mukherjee, *India in the shadows of empire*, chapter 1; Frederick G. Whelan, 'Burke on India', in David Dwan and Christopher Insole (eds.), *Cambridge companion to Edmund Burke* (Cambridge, 2012), 172–6; Daniel O'Neill, *Edmund Burke and the conservative logic of empire* (Berkeley, CA, 2016), 110–23.

<sup>100</sup> Lakshmi Subramanian, 'A trial in transition: Courts, merchants and identities in western India circa 1800', *Indian Economic and Social History Review*, 41, 3 (2004), 269–92.

1817–8, meant that the government could expect land revenue which would be the basis of their financial autonomy and independence from the merchants. These were the moments of Bombay's transformation from 'city state to capital city'.<sup>101</sup> The important shift relating this was that the EIC's officials were prohibited from trading in their private capacity in 1806. This changed the relationship between the government and the court. Thereafter, the Company officials were to deal with the King's Court only in their official capacity and therefore not to derive benefit of the court as private merchants. Territorial administration became the main duty of the Company, and they needed to deal with Indian magnates in villages, hills and mountains in the mofussil, rather than the British and Indian merchants in the presidency town. A new pattern of politics had emerged in Bombay city. Rather than the commercial conflict between the government and the private merchants, that between the government and the King's Court over political affairs in the mofussil became the basic framework of politics in the presidency until 1834.

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<sup>101</sup> Jim Masselos, 'Changing definitions of Bombay: City state to capital city', in Indu Banga (ed.), *Ports and their hinterlands in India (1700–1950)* (New Delhi, 1992), 273–316.

## Chapter 1: Police and the King's Court in Bombay city

### I. Introduction

The role of the King's Court as the constitutional check of the EIC's local government emerged in the late eighteenth and early nineteenth century. It was related to the shifting power balance between the Bombay government and the British private merchants, which highlighted the conflict between the King's Court's logic of law and the government's logic of necessity. In the eighteenth century, as Holden Furber, Pamela Nightingale and Lakshmi Subramanian show, the Company's policies were dominated by the interests of these merchants engaging in the country trade with Bengal and China and holding important offices such as the custom master. They could exert their political power and demand favourable commercial dealings. For example, the commercial interest of the cotton merchants was the chief motive of the Company's 'thrust to the North', or the acquisition of cotton lands in Gujarat and Baroda after the second Maratha war in 1803–5, and, resenting the Company's own purchase of cotton, they could compel the government to restrain the purchase of cotton for a season in the year in 1809–10 despite the opposition of the Court of Directors.<sup>1</sup>

But, as we saw in the last part of Introduction, the autonomy of the government from the control of merchants gradually increased as the result of the expansion of British power in the mofussil. The power of the British

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<sup>1</sup> Holden Furber, *John Company at work: A study of European expansion in India in the late eighteenth century* (London, 1948), 191–224; Pamela Nightingale, *Trade and empire in Western India, 1784–1806* (Cambridge, 1970), chapters 6–7; Lakshmi Subramanian, *Indigenous capital and imperial expansion: Bombay, Surat and the West Coast* (Delhi, 1996), 253–73, 297–8, 315, n172.

merchants was further curtailed by unfavourable economic conditions in the early nineteenth century. Due to the depression in the China trade and the poor communication with the newly acquired hinterland, the economy of the presidency was unstable until the 1830s, when the trade of cotton and opium started to boost its economy.<sup>2</sup>

The rise of the government's influence caused frictions with the European merchants, in which the King's Court's logic of law was given an important role. The case in point was the conflict between the government and the merchants over the municipal governance of Bombay city. Even after 150 years had passed since the first acquisition of the town and island of Bombay from the Portuguese in 1662, the municipal institutions of Bombay city were still in their fledging stage. But, as Mariam Dossal shows, improvements in Bombay's civic infrastructure were necessitated by the rapid urban development in the first quarter of the nineteenth century.<sup>3</sup> The improvements were discussed under the heading of 'police', meaning 'the regulation and control of a community; the maintenance of law and order, provision of public amenities, et cetera'.<sup>4</sup> Because it embraced such a wide variety of activities, an everyday issue in the community could be easily escalated to a conflict over the police authority between the government and the British merchants.

This chapter examines two examples of conflict over the urban policing

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<sup>2</sup> Meera Kosambi, 'Commerce, conquest and the colonial city: Role of locational factors in rise of Bombay', *Economic and Political Weekly*, 20, 1, 1985, 32–37; Claude Markovits, 'Bombay as a business centre in the colonial period: A comparison with Calcutta', in Sujata Patel and Alice Thorner (eds.), *Bombay: Metaphor for modern India* (New Delhi, 1995), 26–46; V. D. Divekar, 'Regional economy 1757–1857: Western India', in Dharna Kumar (ed.), *Cambridge economic history of India, volume 2 c.1757–c.1970* (Cambridge, 1983), 332–52.

<sup>3</sup> Mariam Dossal, *Imperial designs and Indian realities: The planning of Bombay city 1847–1895* (Delhi, 1991), 20–1, 84–5.

<sup>4</sup> *Oxford English Dictionary*.



in the 1810s and 1820s. In the first one, the government's increasing influence over the municipal governance was checked by the justices of the peace (JPs) in alliance with the King's Court. In the second conflict, the King's Court's judges criticised the government's 'despotic' police administration. In both cases, the government tried to vindicate its discretionary interventions based on the logic of state necessity, but this was criticised by the King's Court's alternative vision of urban governance ruled by the regular laws of the municipal courts.

Before beginning the analysis, it is necessary to look at the early history of police in eighteenth-century Bombay city as the background. The conflict between the government and European merchants characterised the earlier period as well. The first attempt of policing commenced in the seventeenth century when the governor of Bombay Gerald Aungier (1669–77) created a native police force called the Bhandari militia. It was primarily aimed at a military protection against the Marathas, the Siddis and other foreign enemies, but it conducted the duty of civil police in the city as well. It was commanded by the Indian officers and chiefly composed by the Bhandaris, a toddy drawing Hindu caste famous for their military character. The number of the militias was 600 in 1760 and 800 in 1770, and in 1771 it was reorganised as a battalion consisting of 48 officers and 400 privates. They were directed to keep the peace by pursuing and arresting rioters, robbers, housebreakers and runaway slaves as well as Europeans without valid passes during the night.<sup>5</sup> The government needed to pay attention to the control of the Bhandari police themselves. The political and military status of Bombay city was still insecure in the eighteenth century. The government had to rely on the Bhandaris as they were 'a military caste and ready to serve the Company in defence of the

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<sup>5</sup> Campbell, *Bombay city materials*, iii. 59.

island upon any emergency'. The government took a conciliatory policy towards the Bhandaris by admitting the arrack farm, because it was feared that the Marathas or the French must try to shake off their allegiance.<sup>6</sup>

Reflecting this, the police in Bombay was controlled in a military style. Until 1779, the issues of policing were directly dealt with by the governor in council and the militia was commanded by military officers. In that year, when a civilian James Tod was appointed the head of the police, he was still styled the Lieutenant of Police.<sup>7</sup> The semi-military character of police was unpopular among Bombay's non-official community. It not only hurt the sensibility of the Englishmen but was particularly problematic because the Lieutenant of Police's salary and other costs of policing were paid by the assessment tax levied on all houses in the city.<sup>8</sup> The grand jury, dominated by European merchants, criticised that the 'office of Police [was] of a most dangerous tendency ... fit only for a despotic Government, where a Bastile [sic] is at hand to enforce its authority'.<sup>9</sup>

Beside the grand jury, the bench of justices of the peace gave another institutional platform for the merchants' criticism of the government. The Charter Act of 1793 enabled the governor general in Calcutta to appoint JPs at the presidency towns. As well as judicial duties of committing criminals, the JPs were authorised to collect an assessment tax for the purpose of 'clearing, watching and repairing' the roads. The assessment was made in the general or

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<sup>6</sup> Campbell, *Bombay city materials*, iii. 329–63, 475–98.

<sup>7</sup> Tod compiled orders previously issued by the Bombay government, which was promulgated in 1780. BL, IOR H/149, 217–302, J. Tod to William Hornby, the governor of Bombay, 31 Dec. 1779, 'Regulations established and confirmed by the Hon'ble the President and Council for the maintaining good order and government on Bombay'.

<sup>8</sup> S. M. Edwardes (ed.), *Gazetteer of Bombay City and Island* [hereafter *City gazetteer*], 3 vols. (Bombay, 1909), ii. 239–40.

<sup>9</sup> Quoted in Morley, *Digest*, ii. 513. See also S. M. Edwardes, *The Bombay city police: A historical sketch 1672–1916* (London, 1923), 12.

quarter sessions of the peace. Its jurisdiction included executive duties such as the collection of wheel tax, regulation of marketplaces, and repair work of the roads.<sup>10</sup> The collection of the assessment tax for the purpose of policing was one of the most important duties. In 1798, there were nine JPs in the island other than the governor and the members of the council who were ex officio JPs.<sup>11</sup> The JPs in Bombay were composed of merchants, lawyers and military and civil servants of the Company. In 1804, for example, there were 3 civil servants, 4 merchants, 1 lawyer, and Superintendent and Deputy Superintendent of Police.<sup>12</sup> The point was that the government's semi-military police was criticised by the merchants' civilian perspective. This demand for a more civilian and independent police was the context in which the King's Court's logic of law was highlighted as opposed to the government's logic of necessity.

## II. Merchants and authority in Bombay city police 1808–12

The conflict between the two logics was observed first in a conflict over the urban police between the JPs and the government in 1808–12, which resulted in the formation of Rule, Ordinance and Regulation I of 1812, 'the basis of the police administration of Bombay until 1856'.<sup>13</sup> The voluminous correspondence<sup>14</sup> between JPs, government and the King's Court reveals that the King's Court represented the British merchants' sense of danger about the

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<sup>10</sup> *City gazetteer*, iii. 1–14.

<sup>11</sup> Morley, *Digest*, ii. 461, F. Warden report, 15 Nov. 1810.

<sup>12</sup> *East India register and directory for 1804*.

<sup>13</sup> Edwardes, *Bombay city police*, 25; S. R. Kapse, *Police administration in Bombay, 1600–1865* (Bombay, 1987), 45.

<sup>14</sup> I use the consultations filed in the Board's Collection as the primary source. BL, IOR F/4/348/8167; BL, IOR F/4/349/8168; BL, IOR F/4/350/8169; BL, IOR F/4/350/8170.

government's arbitrary police administration. The central problem was the government's control of the market by means of the police. As scholars have pointed out, the marketplace was the site of contestation for 'power, authority and status' as well as of business transactions, especially in relation to their regulations by means of the court of law and the police.<sup>15</sup> In Bombay the issue of market and the police provoked a severe conflict between the government and the dominant European merchants in the city. It was in this conflict over the municipal authority that the King's Court proclaimed the role of constitutional check against the government's despotism.

The background of these conflicts was the increasing influence of the East India Company's government on municipal governance. A significant change in JPs' status happened in 1807, when the power to appoint them was transferred from the governor general in Calcutta to the governor of Bombay (47 Geo. 3, c.68).<sup>16</sup> By this measure, the government was empowered to appoint district magistrates in the newly acquired territories in Gujarat.<sup>17</sup> It also altered the composition of the JPs in Bombay city. The number of civil servants increased from one to five, and three were added from military officers.<sup>18</sup> This significantly weakened the dominance of merchants on the bench of JPs. Besides, the responsibility of the chief police officer of the government, the superintendent of police, increased dramatically. It

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<sup>15</sup> Rajat Datta, 'From medieval to colonial: Markets, territoriality and the transition in eighteenth century Bengal', *Medieval History Journal*, 2, 1 (1999), 143–67; Kaustubh Mani Sengupta, 'Bazaars, landlords and the Company government in late eighteenth-century Calcutta', *IESHR*, 52, 2 (2015), 121–46, quotation at 128; Tilottama Mukherjee, 'Markets in eighteenth century Bengal economy', *The Indian Economic and Social History Review*, 48, 2 (2011), 143–76.

<sup>16</sup> Peter Benson Maxwell, *An introduction to the duties of magistrates and Justices of the Peace* (Calcutta, 1871), 2.

<sup>17</sup> Seven magistrates were appointed. *East India register and directory for 1809*.

<sup>18</sup> *Ibid.*; *East India register and directory for 1808*.

incorporated the office of the surveyor of roads in 1797, the clerk of the market, who was responsible for the weights, measures and the market prices, in 1800, and the chief police officer of Mahim division in 1801.<sup>19</sup>

The JPs' resistance to the expanding control of the government began as their inquiry into the state of market in 1808. In that year, Charles Joseph Briscoe, the superintendent of police and the clerk of the market, and Peter P. Travers, the custom master, anticipated the price rise and recommended embargo of grain, wheat, oil and ghee during the monsoon. This was agreed by Governor Jonathan Duncan but objected to by Robert Rickards, a member of the council and a staunch free trader. They disputed over the adaptability of laissez-faire principles in Bombay.<sup>20</sup> Duncan and Briscoe's view was based on their logic of emergency. They were of opinion that the 'general principles assumed in Doctor Smith's work' could not be applied to Bombay because there were contingencies in which the temporary embargo was 'not only advisable but also necessary' to prepare for 'a crisis' such as a sudden withdrawal of grain supply. The government was particularly concerned about the 'contingent and hazardous' provision of meat, which was monopolised by a handful of private dealers. From this view, the government wished the JPs to examine the state of the marketplaces in the island. The JPs reported that there were only three small markets in Bombay city and no public market of beef and fish, and recommended that a vegetable and fruit market, two beef and mutton markets, and a fish market should be erected.<sup>21</sup> It was approved by the

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<sup>19</sup> Morley, *Digest*, ii. 491.

<sup>20</sup> Rickards became the main protagonist of the free trade lobby in the charter renewal debates in 1813 and 1833. Nightingale, *Trade and empire*, 234–5.

<sup>21</sup> BL, IOR F/4/348/8167, 228–41, Bombay Public/General Consultations [hereafter BGC] 6 May 1809, J. Duncan, minute, 24 Apr. 1809. On Duncan's protectionism and Rickards's laissez-faire, see Neil Rabitoy, 'The control of fate and fortune: The origins of market mentality in British administration

government.<sup>22</sup> But the mode of controlling them caused a large-scale conflict between the government and the JPs.

Discussing the new markets, the JPs criticised the government's arbitrary policing in the market. Particularly problematic were the undue levies collected by the superintendent and his subordinates in the name of the clerk of the market. The market committee comprised John Fell, William Crawford, and Luke Ashburner, the latter two being the merchants of agency houses. They criticised that 'every peon of the police establishment considered himself now as vested with a certain power over all those people who resort to the markets or contribute to their master's pecuniary advantages'. In consequence, the superintendent was not like a British magistrate but 'the Cutwall of a native city'. The JPs demanded the separation of the clerk of the market and the superintendent of police because the former's collection of fees should be checked by and appealed to the latter. The fees collected by the superintendent, 'not to fall short of 8,000 rupees', should be used for constructing the new markets.<sup>23</sup>

In a similar vein, the JPs also criticised the superintendent's annexation of the surveyor of the roads and the collector of the wheel tax. Although sufficient tax was collected for the repair of the roads, the superintendent's management of the fund was 'radically defective' and many roads were left unattended. Barrister James Morley was at the forefront of this inquiry and repeatedly interrogated Briscoe in the road committee.<sup>24</sup> Morley was also the

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thought in south Asia', *Modern Asian Studies*, 25, 4 (1991), 737–64.

<sup>22</sup> BL, IOR F/4/349/8168, 533, BGC 3 Jan. 1810, Board's minute, 2 Jan. 1810.

<sup>23</sup> BL, IOR F/4/348/8167, 43–62, BGC 28 Oct. 1808, Market Committee to JPs, 30 Sep. 1808.

<sup>24</sup> BL, IOR F/4/348/8167, 71–123, BGC 26 Nov. 1808, JPs to Gov., 15 Nov. 1808.

secretary for the Market Committee and the Deputy Superintendent of Police.<sup>25</sup> The issue was further disputed when another case against a levy in the market was discovered by the JPs in January 1809. The JPs recommended various measures to deal with the problem. First, they demanded that the government issue a proclamation that the government was determined ‘to prevent such an intolerable grievance and the exercise of all improper influence on authority over the markets’ with the table of fees which were authorised to be collected in the market.<sup>26</sup> The government accepted the measure and issued it as hand bills and in the *Bombay Courier*.<sup>27</sup>

Second, the JPs demanded the reform of the assessment tax, which was used for the disbursement of the police establishment. They appointed a committee to inquire into the use of the tax. The committee pointed out that the tax was in deficit because it was used for various purposes other than ‘the repairing, watching, and cleansing the streets’ as stipulated in the law. They claimed that the government should refund these costs charged against the assessment fund as they should have been paid by the government. For example, a constable employed under the clerk of the market at Rs 7.2 per month by the order of the JPs on 1 November 1796 was not legally chargeable on the assessment tax and therefore should be refunded by the government.<sup>28</sup>

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<sup>25</sup> Morley was a controversial figure in the Bombay society. He had been a barrister in the Mayor’s Court but was deprived of his office in the newly established Recorder’s Court. He solicited the governor of Bombay and the President of the Board of Control to appeal to the Court of Directors. BL, IOR H/432, 249–58, James Morley to J. Duncan, 6 Nov. 1799, and J. Morley to Henry Dundas, 17 Dec. 1799.

<sup>26</sup> BL, IOR F/4/348/8167, 168–9, BGC 31 Jan. 1809, JPs to Gov., 13 Jan. 1809.

<sup>27</sup> BL, IOR F/4/348/8167, 296–301, BGC 6 May 1809, Government advertisement, 2 May 1809.

<sup>28</sup> BL, IOR F/4/349/8168, 5, BGC 25 July 1809, Committee of Establishments, report, 1 May 1809.

The JPs also suggested two plans of reducing the establishment of day and night patrol for the purpose of retrenchment. The police establishment at that time was 1 inspector, 38 constables, 3 havildars, 4 naiques and 202 peons. Morley's plan recommended reducing it to 3 constables and 125 peons. This was approved by the other six JPs in the committee except Money and Briscoe, who suggested a more moderate reduction to 1 inspector, 28 or 29 constables, 3 havildars, 4 naiques, and 152 peons.<sup>29</sup> Third, they suggested that the government should use its profit from the sale of rice during the famine of 1803–5 for the purpose of constructing and improving the new markets, roads, and tanks, because the European and Indian inhabitants were suffering from unfavourable conditions of trade, the damage of the fire of 1803, and the 'heavy revenue collected in duties, assessments, and other taxes'.<sup>30</sup>

This proposal infuriated the government officials. Their response was expressed by a Police Committee appointed by the government in order to investigate the issue. It was composed of Francis Warden, the chief secretary, John Hungerford, the Company's Solicitor, and Briscoe, the superintendent of police.<sup>31</sup> The committee rejected the JPs' demands and made a counter claim

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<sup>29</sup> Ibid., 11–6.

<sup>30</sup> BL, IOR F/4/349/8168, 163–70, BGC 8 Sep. 1809, JPs to Gov., 4 Aug. 1809.

<sup>31</sup> BL, IOR F/4/349/8168, 205, BGC 8 Sep. 1809, J. Duncan, minute, 12 Aug. 1809. As to the appointment of this committee, there was a conflict within the government. Liberal Robert Rickards criticised that the appointment of the Superintendent to enquire about his establishment was contrary to the principle of impartiality, which should be equally adhered to in Europe and in Asia. But this was opposed other members of the council. Thomas Lechmere stated that 'Mr Rickards's reasoning may be good in a place like England, but in situations like Bombay we must and ought to be guided by local circumstances'. His appointment was passed by the majority in the council. BL, IOR F/4/349/8168, 263–86, BGC 20 Oct. 1809, Robert Rickards, minute, 3 Sep. 1809; Ibid., 292, Thomas Lechmere, minute, 6 Sep. 1809; Ibid., 297–8, Board's minute, 20 Oct. 1809.



for damage Rs 1,35,800 for the government's disbursement which should have been paid by the assessment fund.<sup>32</sup> This strong reaction was not because the government was opposed to the retrenchment. The committee suggested that the police establishment should be reduced to 24 constables 3 havildars, 4 naiques and 92 peons, which was even smaller than Morley's plan.<sup>33</sup> The real cause of the government's reaction was related to the problem of authority in regard to the city's policing. This was clearly stated in the police committee's report on 15 Nov. 1810 written by Francis Warden.

Warden stated that the JPs' proposals endangered 'the dignity and authority of the government'. They exceeded the limit of their judicial power in that they acted as if they had a right to modify or veto the governor's legislation. The legislative authority was exclusively given to the governor. While the general and quarter sessions of the JPs were responsible for collecting the assessment tax, their sessions could modify the police establishment only when the governor participated in it as the ex-officio JP: 'His Majesty's Justices of the Peace, or a Bench of them, have no voice whatever in the enactment of these rules and ordinances, but only in their enforcements and due operation'.<sup>34</sup>

Warden was particularly concerned about a proper hierarchy in the administration of police, in which the government-appointed superintendent should have the supreme authority. This anxiety was caused by a recent conflict between Briscoe and Morley, the deputy superintendent of police. Briscoe complained that Morley 'has been anxiously and arduously employed'

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<sup>32</sup> BL, IOR F/4/350/8169, 47–70, BGC 22 May 1810, Police Committee, report, 17 May 1810.

<sup>33</sup> Ibid., 77–8.

<sup>34</sup> Morley, *Digest*, ii. 471–7, quotation at 471, Police committee, report, 15 Nov. 1810.

to lessen ‘the respectability of [Briscoe’s] situation in the eyes of the natives and to reduce [his] authority into contempt’. He explained that because the superintendent was also a high constable, who was to execute the warrants issued by the bench of JPs, Morley as a JP issued a warrant to command Briscoe to arrest a person. In other words, it was feared that the executive looked subjected to the order of the judiciary.<sup>35</sup> Briscoe said that this subversion of hierarchy was inimical to the proper prosecution of the duty as the head of police department. He solicited the government to remove Morley from the office of deputy superintendent. Briscoe emphasised that the hierarchy of authority was ‘absolutely indispensable in an office like mine, to which the native population of this island in particular, have long been accustomed to look up, and through which the protecting arm of government has been extended over them’.<sup>36</sup> The government even discussed depriving Morley of his commission of the peace, though it was not realised.<sup>37</sup>

In order to consolidate the clear hierarchy of police authority, Warden proposed the introduction of the stipendiary magistrates. Here Warden consciously followed the example of London, where the stipendiaries were introduced for the purpose of centralisation of the police.<sup>38</sup> Relying on Patrick Colquhoun’s practice on the London police, Warden proposed that there should be two (senior and junior) stipendiary magistrates, who would

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<sup>35</sup> Ibid., 491–2.

<sup>36</sup> BL, IOR F/4/349/8168, 330–43, BGC 10 Nov. 1809, C. Briscoe to Gov., 27 May 1809.

<sup>37</sup> BL, IOR F/4/349/8168, 377–403, BGC 6 Dec. 1809, R. Rickards, minute, 4 Dec. 1809.

<sup>38</sup> For the policing in London, see Clive Emsley, *The English police: A political and social history*, (2nd edition, London, 1996), 21; E. Reynolds, *Before the Bobbies: The night watch and police reform in metropolitan London 1720–1830* (Basingstoke, 1998); Andrew T. Harris, *Policing the City: Crime and legal authority in London 1780–1840* (Columbus, OH, 2004); Clive Emsley, *The Great British Bobby: A history of British policing from the 18<sup>th</sup> to the present* (London, 2009).

hear and determine criminal cases in summary proceedings and send felony cases to the superior court. Their duties also included the collection of assessment and wheel taxes and the authorisation of their disbursements.<sup>39</sup> By this means, the government tried to increase its control over the municipal governance and police. Thus, Warden's report was boiled down to an attempt to criticise the JPs and to establish the superior authority of the government in municipal governance. He referred to the police system of Calcutta, which, according to him, had become less efficient because of 'the extension of powers granted to Justices of the Peace'. In a determined tone, he cautioned that 'the existence of any subordinate authority that is likely in the slightest degree to derogate from the power and dignity of the executive Government, I consider dangerous to the constitution of Colonial Governments'.<sup>40</sup> In this way, the issue of the assessment tax escalated to an open political conflict between the government and the JPs over the legitimacy in the municipal governance.

It is worth noting here that, although the government's particular apprehension was the problem of authority, the issue of urban policing sheds light on another, more general difficulty experienced by the colonial government. Warden in his 1810 report lamented frequent gang robberies in and around Bombay city. He reported examples such as the raid of freebooters in 1793 and 1806–7 and 'the recent attack of the Cossids [couriers]'.<sup>41</sup> The situation was further exacerbated in the next year when, in the midst of the negotiation between the JPs and the government, the Bhandari caused a riot protesting the abkaree (liquor) tax. The background of the rebellion was the

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<sup>39</sup> Morley, *Digest*, ii. 482–4.

<sup>40</sup> *Ibid.*, 496.

<sup>41</sup> Morley, *Digest*, ii. 492.

change of government policy towards the Bhandaris in the early nineteenth century. When the three-year contract was expired in 1807, the government abolished the farming and introduced the abkari tax collected by the collector. The policy was aimed at removing monopoly, increasing revenue and preserving ‘the morals and health of the lesser classes of the inhabitants’.<sup>42</sup> This raised great discontent among the Bhandaris. They complained of the revenue officials’ inflexible and rigorous collection. Furthermore, the government raised the tax from 1 January 1811, which led to widespread rioting through 1811 and 1812. The caste headmen (mukaddams, choglas and patils), some of whom were government payrolls, instigated rather than restrained the rioters. The riot was soon quieted and the leaders were expelled or punished, but the collector’s difficulty in collecting the tax continued after the riot.<sup>43</sup> The 1811 Bhandari riot suggests a fundamental difficulty at the heart of colonial domination: the government had to rely on the Indians to make an effective and economical system of administration, but it should always retain the power to control them. As we shall see in the following chapters, this problem of right balance between conciliation and control was also experienced in the mofussil, suggesting that the government officials experienced the same issue of enlisting and controlling potential criminals as the police both in towns and provinces.

The correspondence between the JPs and the government continued, which revolved around the amount of compensation. The government only admitted the refund of Rs. 15,300 which was derived from ‘an oversight’, whilst the JPs

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<sup>42</sup> BL IOR P/366/59, BRC 2 Feb. 1808, 559–635. J. Duncan, minute, 1 Feb. 1808.

<sup>43</sup> Mariam Dossal, *Theatre of conflict, city of hope: Mumbai 1660 to present times* (New Delhi, 2010), 73–4.

demanded the sum of Rs 1,85,000.<sup>44</sup> They could not find a point of compromise and agreed to refer the case to arbitration of James Mackintosh, the recorder of Bombay (1804–11).<sup>45</sup> Mackintosh decided in favour of the JPs and ruled that the government should adjudge Rs 42,156 to the assessment fund, which was larger than the government's claim but much smaller than that of the JPs.<sup>46</sup> The government accepted the result and paid the sum accordingly.<sup>47</sup>

This event induced Mackintosh to write a report on the reform of the Bombay police in 1811. He must have been impressed about the corruption of police by the arrest of Briscoe, who allegedly sheltered a murderer in November 1810. Mackintosh tried and sentenced him for 12 months' imprisonment. The governor and the council were opposed to the trial, but Bombay merchants demanded it. After the sentence and conviction, Mackintosh was thanked by the grand jury.<sup>48</sup> But his criticism also emanated from his whiggish antipathy to the despotic tendencies of the police:

A precipitate, clandestine, and arbitrary jurisdiction: a power of trying as a Judge pleases, of convicting for what crime he pleases, and condemning to what punishment he pleases, without responsibility to his superior's restraints from law, or check from public opinion; would be a situation of danger to the highest human virtue, and is perfectly sure to

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<sup>44</sup> BL, IOR F/4/350/8170, 149–50, Warden's summary, n.d.; BL, IOR/F/4/348/8167, 19A–E, Bombay Public/General Letter [hereafter BGL], Gov. to CoD, 30 Oct. 1811.

<sup>45</sup> He arrived in Bombay in 1804, with his general concern in the reform of police, penal law and prison. He had already established his fame a prominent Whig in Britain by attacking Edmund Burke in his *Vindiciae Gallicae* (1791).

<sup>46</sup> BL, IOR F/4/350/8170, 294–7, BGC 28 Oct 1811, W. A. Morgan to Gov., 26 Oct. 1811.

<sup>47</sup> BL, IOR F/4/348/8167, 19A–E, BGL, Gov. to CoD, 30 Oct. 1811.

<sup>48</sup> Jane Rendall, *The political ideas and activities of Sir James Mackintosh (1765–1832): A study in whiggism between 1789 and 1832* (London Univ. Ph.D thesis, 1972), 188.

corrupt mere common integrity.<sup>49</sup>

He pinpointed the arbitrariness and illegality of the superintendent's summary conviction and punishment at the police office. He gave four reasons: because they were inflicted under rules which were not approved by the Court of Directors or registered to the Recorder's Court; because the suspects were convicted by a single justice not restrained by his colleagues or by the 'public'; because many of these cases were felonies, which could not be summarily convicted; and because punishments such as banishment or hard labour in chain were too harsh to be sentenced without a trial by jury.<sup>50</sup> These were, Mackintosh added, not 'moderate and reasonable corporal punishment' allowed in the law, but were equal to the punishment of galley slaves utilised 'in the most despotic countries'.<sup>51</sup> It was the infringement of 'the legal privileges of British subjects' that 'a Superintendent of Police may arrest forty men in the morning; he may try, convict, and condemn them in forenoon; and he may close the day by exercising the Royal prerogative of pardon towards them all'.<sup>52</sup> A 'system of vexatious inquisitions into private concerns of every individual' would debase human mind and increase rather than decrease the crimes. The real energy of the police should be employed not 'for the purposes of state' but 'for the security of society'.<sup>53</sup>

Based on this antipathy against the arbitrariness, he recommended the abolition of the superintendent of police and its replacement with a new court of petty sessions composed of two stipendiary and one lay magistrate.<sup>54</sup> He

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<sup>49</sup> Morley, *Digest*, ii. 512, Mackintosh, report, Oct. 1811.

<sup>50</sup> Ibid., 508, 511.

<sup>51</sup> Ibid., 510.

<sup>52</sup> Ibid.

<sup>53</sup> Ibid., 518.

<sup>54</sup> Ibid., 520–1.

was emphatic about the importance of lay magistrates. He said that the merchants should be the JPs in a commercial empire like the British. In the same vein, contrary to Warden, he highly evaluated the police in Calcutta where the power of the JPs was as strong as in the City of London.<sup>55</sup> On the other hand, stipendiaries were not allowed to inflict summary punishment as single justice.<sup>56</sup> The point was that ‘nothing should be left upon the vague and precarious tenure of usage, but that every necessary authority should be clearly defined and effectually conferred’.<sup>57</sup> Furthermore, in order to make the officers comply with the law, Mackintosh compiled the previously existing regulations and specified the constitutive elements of various crimes and the proper conducts police officers to deal with them. These proposals by Mackintosh were adopted by the government as Rule, Ordinance and Regulation I of 1812, which was passed by the governor in council on 25 March 1812 and registered in the Recorder’s Court on 20 May 1812.

In this way, the conflict between the government and the JPs was settled by the arbitration of the recorder. It gave him a chance to articulate his whig idea about the proper mode of policing in the city.<sup>58</sup> Why such a critical proposal was accepted by the government was difficult to know, but it is important to note that his principles of legislation were not so remote from that of the government. At the core of Mackintosh’s juridical view was the conviction that ‘A law is a command’:

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<sup>55</sup> Ibid., 522.

<sup>56</sup> Ibid., 521.

<sup>57</sup> Ibid., 523.

<sup>58</sup> Cf. Patrick O’Leary, *Sir James Mackintosh: The whig Cicero* (Aberdeen, 1989); Andrew Thomas Goodall, ‘Politics and history in England 1793–1832: Sir James Mackintosh and his critics’ (Sussex Univ. D.Phil thesis, 2009); A. L. Gust, ‘Empire, exile, identity: Locating Sir James Mackintosh’s histories of England’ (London Univ. Ph.D thesis, 2010).

Its language ought to be clear and short, quickly understood and easily remembered: its excellence is that imperative brevity which leaves no pretext for doubt and no excuse for disobedience. The perfection of the language of command is to be found in military orders; nor is this wonderful, for it is in war that any defect in the expression of a command may be attended with the most immediate, extensive, and irreparable mischiefs. The complexity of civil affairs will not suffer us to attain this point of perfection; we can make only distant approaches to it; but a law giver ought to have it before him as a model of the style of authority.<sup>59</sup>

Mackintosh wrote this passage to protect the Indians from the arbitrary measures of the government's police officers by subjecting the latter to the law, but in the latter part of the above passage he himself slipped into seeing the law as a tool of domination over the Indians' civil affairs. This ambivalent view about law as a means of judicial check and that of the executive's command was of central importance for the construction of the conflicting logics of law and emergency. As we shall see later, the utilitarian command theory of law would be strongly associated with the government's logic of emergency, while the natural law theory of common law was tied to the King's Court's logic of law. Indeed, as the next section's case shall show, Mackintosh's political and military view of the law was appropriated by the government to claim the necessity of strong police measures.

Another important factor which facilitated the conciliation of the government and the recorder was Mackintosh's personal influence and social network in the government circle. He was at the centre of Bombay's public life as the founder of the Bombay Literary Society (1804), whose members included Governor Duncan and members of the council Rickards and

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<sup>59</sup> Morley, *Digest*, ii. 516.



Lechmere.<sup>60</sup> Furthermore, he had good relationships with the would-be Bombay governors Mountstuart Elphinstone and John Malcolm. They often dined together in 1811 and exchanged ideas on philosophy, history and colonial governance.<sup>61</sup> Mackintosh, born in Scotland, had studied among the prominent Scottish intellectuals such as Adam Ferguson and Dugald Stuart. He shared the background of Scottish enlightenment with Elphinstone and Malcolm, the scholar administrators.<sup>62</sup> Their amity was nurtured by their shared historical interest, which was indicated by the fact that Elphinstone decided to write his *Account of the kingdom of Caubul* (1815) by Mackintosh's suggestion.<sup>63</sup> However, though mitigated by Mackintosh's vision of law and sociability, the conflict in 1808–12 suggested that the King's Court could be used for criticising the government.

The relationship between the King's Court and the government deteriorated in the rest of the 1810s. The conflict became manifest under the recordership of Alexander Anstruther (1812–9), 'a conscientious lawyer, jealous of his position and independence'.<sup>64</sup> The government tried to curtail the Recorder's Court's independence by interfering in the selections of its three

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<sup>60</sup> *East India register and directory for 1811*.

<sup>61</sup> Robert James Mackintosh (ed.), *Memoirs of the life of Sir James Mackintosh*, 2 vols. (London, 1835), ii. 64, 88–9, 95, 100–3, 113–4.

<sup>62</sup> Martha McLaren, *British India and British Scotland 1780-1830: Carrier building, empire building, and a Scottish school of thought on Indian governance* (Akron, OH, 2001); Christopher J. Finlay, 'Mackintosh, Sir James, of Kyllachy (1765–1832)', *ODNB*; online edn, Jan. 2010 [<http://www.oxforddnb.com/view/article/17620>, accessed 23 Jan. 2016].

<sup>63</sup> Mountstuart Elphinstone, *An account of the kingdom of Caubul, and its dependencies in Persia, Tartary and India: Comprising a view of the Afghan nation, and a history of the Dooraunee monarchy* (London, 1815), iv.

<sup>64</sup> Katherine Prior, 'Anstruther, Sir Alexander (1769–1819)', in H. C. G. Matthew and Brian Harrison (eds.), *Oxford Dictionary of National Biography* (Oxford, 2004) [hereafter *ODNB*]. [<http://www.oxforddnb.com/view/article/586>, accessed 23 Jan. 2016].

aldermen-judges. In 1814, Anstruther complained that the government encouraged the aldermen-judges to reject his advice, which was ‘most objectionable in its content and most insulting to me in my judicial character’. He sent several letters of complaint to the Privy Council, the Lord Chancellor, and the Court of Directors.<sup>65</sup> Anstruther explained that the government started to appoint new aldermen-judges without consulting the recorder. He complained that the government’s Advocate General ‘upon almost every occasion in which he had felt any interest, addressed himself to the aldermen, calling upon them to exercise their own individual judgements, even on mere points of law relating to the practice of the court’.<sup>66</sup>

The issue of urban policing remained the focus of conflict between the King’s Court and the government. In 1817, Anstruther doubted the validity of conviction of the Indians under Rule, Ordinance and Regulation I of 1812 which was not yet translated into the Indian languages. He said that the conviction was illegal, though Nepean and Macklin vindicated the legality. Anstruther denounced that ‘the due promulgation of the laws cannot be viewed as an act of favour at all nor discretion in the government, as might suit its convenience’.<sup>67</sup> Anstruther and the JPs also criticised the government’s measure when it extended the areas of assessment tax in Regulations IX of 1815 and III of 1817.<sup>68</sup>

Such conflicts gradually re-organised the tripartite structure of Bombay’s politics into a bi-polar one. The above conflict over the untranslated police regulation exhibited the sign of that change. The JPs also

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<sup>65</sup> Ibid.

<sup>66</sup> BL, MSS Eur. D32, 223–4, A. Anstruther to Lord Chancellor Eldon, n.d.

<sup>67</sup> BL, MSS Eur. D32, 212, Anstruther to Gov., 4 Feb. 1818.

<sup>68</sup> Jim Masselos, ‘Changing definitions of Bombay: City state to capital city’, in Indu Banga (ed.), *Ports and their hinterlands in India (1700–1950)* (New Delhi, 1992), 296–8.

lamented the problem in 1819, but, contrary to the conflict on assessment tax in 1808–12, they did not send it to the recorder's arbitration. They explained that it was because it would certainly be harmful to Indians' confidence for the British government if the legal conflict occurred between the British authorities in the city.<sup>69</sup> This indicates that the centre of civil protest against the government shifted from the European merchants to the King's Court. Likewise the JPs acquiesced in the government's demand when it requested that JPs agree with the extension of the area of assessment tax in 1824 and 1826.<sup>70</sup> This tendency became clearer in the conflicts between the governor Mountstuart Elphinstone and the chief justice Edward West on the police in the 1820s, which is the topic of the rest of this chapter.

### III. Necessity of discretion in urban policing in the 1820s

Edward West was the recorder of Bombay (1823) and the first chief justice of the Bombay Supreme Court (1823–8). He was a major character in the conflict between the government and the King's Court in Bombay in the 1820s. While he is well known as a political economist who theorised the principle of diminishing returns at about the same time as David Ricardo did,<sup>71</sup> his Indian career has been understudied, and his evaluation has been divided between those who support his reformist outlook and those who criticised his

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<sup>69</sup> BL, IOR F/4/638/17670, 23–4, JPs to Gov., 25 Oct. 1819, 'Memorial of His Majesty's Justices to the Court of Directors complaining of the delay in translating the police enactments of the Town and Island of Bombay into the native languages'.

<sup>70</sup> Masselos, 'Changing definitions of Bombay', 296–8.

<sup>71</sup> Maxine L. Berg, 'West, Sir Edward (bap. 1782, d. 1828)', *ODNB*, [<http://www.oxforddnb.com/view/article/29079>, accessed 23 Jan. 2016]; William D. Grampp, 'Edward West reconsidered', *History of Political Economy*, 2 (1970), 316–43.

opposition to the government.<sup>72</sup> His conflict with the governor Mountstuart Elphinstone in the 1820s is still regarded as the expression of their personal enmity and mutual misunderstanding. This was true to some extent. Unlike Mackintosh, West was not the member of the Bombay Literary Society, a centre of Elphinstone's social circle. A small misunderstanding between the two almost led them to engage in a duel.<sup>73</sup>

But the conflict was structural as well as personal. At the core of this rivalry were the different perspectives on the judicial administration in the presidency town: the government insisted on the need for it to act with discretion; the judges demanded strict adherence to rules and procedures. It was shown in 1823 when the chief justice held a special court 'for the purpose of publicly reprehending' William Erskine, Elphinstone's protégé, for frauds and extortions. He was judged guilty and dismissed from the offices of the master in inquiry and the clerk of the small cause court.<sup>74</sup> Erskine, a renowned orientalist scholar, was a member of the regulation committee in charge of compiling Elphinstone's new regulations. This issue became a subject of a press war between the judge and the government. The government claimed that 'informalities in pleading or in technical forms' were necessary. By contrast, West supported legality rather than discretion, emphasising that the King's Court was the protector of the Indians from extortion, fraud and oppression.<sup>75</sup>

West's criticism of the government's illegal discretion led him to

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<sup>72</sup> Drewitt's *Memoirs of Edward West* (1935) was sympathetic. James Douglas, *Glimpses of old Bombay and western India* (1900) was critical.

<sup>73</sup> Frederic Dawtrey Drewitt, *Bombay in the days of George IV: Memoirs of Sir Edward West, with hitherto unpublished documents* (second edition, London, 1935), 225–33.

<sup>74</sup> *Oriental Herald*, 18 (1828), 137–51.

<sup>75</sup> *Asiatic Journal*, 25 (1828), 452–61, quotation at 454

frequently criticise the police in Bombay city. In 1825, he gave a long charge to the grand jury on the issue, declaring that the system of Bombay police was ‘a system of discretion, and never a system of law’. West frequently quoted from Mackintosh’s report on the police as an authority. Like Mackintosh, West singled out the arbitrary use of banishment and flogging, which were unproportionally severe rather than ‘reasonable and moderate’ as stipulated in the law. Particularly problematic was that the prisoners were denied the chance to petition the King’s Court for a writ of habeas corpus. He also followed Mackintosh in criticising the single magistrate’s trying, flogging and banishing of felons.<sup>76</sup> West concluded that ‘the whole system of the police was illegal, it must be entirely eradicated, and a new system must be adopted’. This was accompanied by his assertion of the Supreme Court’s sovereign status in the matter of police: ‘no other authority than this court has any, the least, control over [the justices of the peace]’.<sup>77</sup>

The grand jury denied the need for reform based on the logic of expediency. The foreman was the government’s secretary Charles Norris. He answered that, on the ground of ‘expediency alone, and not the legality of the Police Regulations’ and ‘considering the peculiar circumstances of Bombay, ... any reduction of power of the police magistrates ... would be attended with the greatest danger, and would add much to the increase of crime’. They added that the removal of aliens and the punishment of flogging should be continued with the same frequency and severity, and that the examples of flogging mentioned in West’s charge, ‘(however it might shock the feelings of a

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<sup>76</sup> He singled out the illegality of the Regulation I of 1814, whose article 5 stipulated that the single magistrate could flog servants upon a testimony of masters.

<sup>77</sup> *Oriental Herald*, 9 (1826), 410–24.

gentleman unaccustomed to such sights), was moderate in every respect'.<sup>78</sup>

The members of the governor's council also strongly reacted against West's police charge based on the logic of state necessity. Richard T. Goodwin vindicated the conduct of the previous police superintendents, including Briscoe, and argued that the summary conviction and punishment was 'not only salutary, but also absolutely necessary in many cases for the peace, controul, security and convenience of the community'.<sup>79</sup> Francis Warden, now a member of the council, also claimed the usefulness of the summary justice in such places as Bombay and commented that West (as did Mackintosh) intended to 'calculate to disseminate an impression that the duties of the police and all punishments were discharged and inflicted by an arbitrary agent, unchecked and uncontrolled'.<sup>80</sup> Reflecting these, the government communicated to the Supreme Court that any 'radical' reform was unnecessary, explaining that the problem was rather a want of energy than the excessiveness or illegality of the police.<sup>81</sup>

Government officials' sense of crisis was based on their concern about the problems caused by the city's vagrant and alien population. There was a large floating population of 10,000 or 20,000 in Bombay city in 1826.<sup>82</sup> Like other regions, the city was troubled by the banjaras, fakirs and gosains.<sup>83</sup> Its

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<sup>78</sup> *Oriental Herald*, 9 (1826), 424–5, answer to the charge, 17 Oct. 1825,

<sup>79</sup> BL, IOR F/4/1336/52921, 159–81, quotation at 170, BGC 4 Jan. 1826, no. 1, Goodwin, minute, 10 Nov. 1825.

<sup>80</sup> As the author of the government report of 1811, Warden was critical of Mackintosh's Rule, Ordinance and Regulations I of 1812. BL, IOR F/4/1336/52921, 269–70, 283–90, BGC 4 Jan. 1826, no. 11, Warden, minute, 19 Dec. 1825.

<sup>81</sup> BL, IOR F/4/1336/52921, 398–99, 401–3, BGC 4 Jan. 1826, no. 20, Gov. to Supreme Court [hereafter SC], 2 Jan. 1826.

<sup>82</sup> Amar Farooqui, 'Urban development in a colonial situation: Early nineteenth century Bombay', *Economic and Political Weekly*, 31, 40 (1996), 2750–1, Bombay census, 1826, table 1.

<sup>83</sup> Nitin Sinha, 'Mobility, control and criminality in early colonial India

bazaars were often disturbed by ‘fanaticism’ caused by them.<sup>84</sup> Warden explained that as Bombay was surrounded by foreign powers, the inhabitants were naturally suspicious of the inflow of vagrants and religious mendicants. He wanted to deport vagrants who had no regular means of subsistence. This might be contrary to the laws of England but was ‘justified by the laws of expediency’.<sup>85</sup> In 1826, the Indian inhabitants in Bombay city petitioned the government to strengthen the police to deal with frequent robberies, pointing out that the effects of wars in adjacent countries resulted in the increase of immigration in Bombay. They added that robbers avoided punishment by employing attorneys and barristers.<sup>86</sup>

After West’s 1825 charge, the conflict between the government and the Supreme Court escalated. The government proposed a new police regulation to suppress robberies more efficiently.<sup>87</sup> West replied that the deteriorating order was not due to police regulations but to the inefficiency of the government’s police magistrates, and that the new regulation could not be admitted in the form proposed by the government.<sup>88</sup> The government replied that the present mode of summary conviction and punishment was necessary in Bombay.<sup>89</sup> The judges repeated their points, and Elphinstone only

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1760s–1850s’, *IESHR*, 45, 1 (2008), 1–33.

<sup>84</sup> R. Bentley, *Life in Bombay, and the neighbouring out-stations* (London, 1852), 141–3.

<sup>85</sup> BL, IOR F/4/1336/52921, 294–5, 297, BGC 4 Jan. 1826, no. 11, Warden, minute, 19 Dec. 1825. See also BL, IOR F/4/1336/52921, 354, BGC 4 Jan 1826, no. 16, Goodwin, minute, 23 Dec. 1825.

<sup>86</sup> BL, IOR F/4/1336/52921, 424–33, BGC 15 Mar. 1826, no. 9, Hormasjee Bomanjee, Dundass Hwyewandass and inhabitants of Bombay to Gov., 15 Feb. 1826.

<sup>87</sup> BL, IOR P/346/28, BGC 7 June 1826, no. 91, Gov. to SC, 14 Apr. 1826.

<sup>88</sup> *Ibid.*, no. 88, E. West to M. Elphinstone, 23 Mar. 1826; *Ibid.*, no. 93, SC to Gov., 18 Mar. 1826; *Ibid.*, no. 95, SC to Gov., 23 Mar. 1826.

<sup>89</sup> *Ibid.*, no. 97, Gov. to SC, 14 Apr. 1826.

suggested not provoking the judges.<sup>90</sup>

Frustrated, Elphinstone decided to end the correspondence with the judges. He proposed to make the draft of the new regulation and consulted the Advocate General George Norton.<sup>91</sup> Norton replied that the police jurisdiction over the felonies was not admitted in England and would be judged illegal.<sup>92</sup> However, Elphinstone insisted on the need of strong police force. He replied that the police should be authorised to try felons and, if it was not admitted in England, its expediency should be articulated in the preamble of the new regulation.<sup>93</sup> Norton modified the draft and sent it to the Supreme Court for registration.<sup>94</sup>

In the end, West rejected the registration in March 1827, exercising the King's Court's power to do so.<sup>95</sup> He repeated his criticism that the power of summary conviction and punishment was not properly defined in the regulation. He concluded that he would 'never sanction this system of supplying the defect of vigilance in the police' which allowed 'the extraordinary powers with which the regulations would vest the magistrates'.<sup>96</sup> The government ordered the Advocate General to amend the regulation.<sup>97</sup> The chief justice's criticism of the police was also reported in

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<sup>90</sup> Ibid., no. 99, SC to Gov., 13 Apr. 1826; Ibid., no. 100, M. Elphinstone, minute, n.d.

<sup>91</sup> Ibid., no. 113, Gov. to G. Norton, 8 May 1826.

<sup>92</sup> BL, IOR P/346/29, BGC 5 Aug. 1826, no. 113, G. Norton to Gov., 28 July 1826.

<sup>93</sup> BL, IOR P/346/28, BGC 14 June 1826, no. 23, Gov. to G. Norton, 8 June 1826.

<sup>94</sup> BL, IOR P/346/30, BGC 13 Sep. 1826, no. 17, Gov. to G. Norton, 9 Sep. 1826; BL, IOR P/346/30, BGC 27 Sep. 1826, no. 33, Gov. to G. Norton, 26 Sep. 1826; Ibid., no. 36, Gov. to SC, 26 Sep. 1826.

<sup>95</sup> *Oriental Herald*, 14 (1827), 515–33.

<sup>96</sup> Ibid., 532–3.

<sup>97</sup> In the next year, the regulation was re-submitted to the Supreme Court, and the amended points were sanctioned. BL, IOR P/346/36, BGC 11 Apr. 1827, nos. 7–19.



Calcutta<sup>98</sup> and soon reached Britain, and the London radicals used it as an example of the Bombay government's arbitrary and inhuman administration in the sub-continent.<sup>99</sup> This cooperation between the judges in Bombay and the radicals in London was also a recurrent feature of our story.

It is convenient here to look at another cause of the reform public, the freedom of the press, in which the government's logic of emergency was further criticised by the King's Court's logic of law. The issue is important because it shows that the government's attitude to the urban reform culture was related to its sense of crisis in the mofussil. It was represented in Governor Elphinstone's comment on the press. In 1824, Elphinstone expressed his concern that 'some of the natives at the Residencies now read our papers, have papers of their own, talk of liberty and Whigs and Tories', and, though the vast mass of Indians remained 'in their original ignorance' and blindly looked up to the British government, all of them, especially the sepoys, were 'ready to trample on it if they see it despised by their superiors'.<sup>100</sup> This comment suggests that Elphinstone saw the problem of the freedom of the press chiefly from the viewpoint of the security in the mofussil.

His concern was shared by many of the Company's officials. As Douglas Peers argues, the government in 1820s India was a beleaguered garrison state soaked with military ideology and preoccupied with 'security, financial solvency, and political legitimacy'.<sup>101</sup> This was most strongly

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<sup>98</sup> *Oriental Herald*, 9 (1826), 362–5.

<sup>99</sup> In the East India House, the radical peer Leicester-Stanhope raised a motion accusing the previous police regulations. *Oriental Herald*, 10 (1826), 169–83.

<sup>100</sup> Colebrooke, *Life of Elphinstone*, ii. 165, M. Elphinstone to E. Strachey, 17 Nov. 1824.

<sup>101</sup> Douglas M. Peers, *Between Mars and Mammon: Colonial armies and the garrison state in India 1819–1835* (London, 1995), 8.

expressed by the administrators called Wellesley's Kindergarten, the most prominent of which included the 1820s Bombay governors Mountstuart Elphinstone and John Malcolm. Malcolm epitomised the essence of the ideology as follows: 'The only safe view that Britain can take of her empire in India is to consider it (as it really is) always in a state of danger ...'.<sup>102</sup> This Anglo-Indian militarism permeated both in EIC's civilian institutions and the military, as the existence of the former was thought to depend on the latter. Constant preparedness of the army was essential not only to deal with emergencies but also to convince the Indians of the futility of resistance.<sup>103</sup> Malcolm explained that the British empire was 'the empire of opinion':

[T]here can be no doubt that empire is held solely by opinion; or, in other words, by that respect and awe with which the comparative superiority of our knowledge, justice, and system of rule, have inspired the inhabitants of our own territories; and that confidence in our truth, reliance on our faith, and dread of our armies, which is impressed on every nation in India.<sup>104</sup>

As we shall see in later chapters, this ideology was most strongly articulated in relation with the raids and rebellions in the mofussil, but the officials' sense of crisis also influenced their attitude towards the reforms in the presidency towns.

Contrasted with this view, the importance of the King's Court in Bombay's reformist culture originated in its distinctively civilian perspective for society ruled by the regular courts of law, as opposed to the government's

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<sup>102</sup> John Malcolm, *The political history of India from 1784 to 1823*, 2 vols. (London, 1826), ii. 76. Also quoted in Peers, *Mars and Mammon*, 45.

<sup>103</sup> Peers, *Mars and Mammon*, 38, 45–6, 53–4, 63–5. See also Lynn Zastoupil, *John Stuart Mill and India* (Stanford, 1994), 56–74

<sup>104</sup> Malcolm, *Political history*, i. 145.

political interpretation of it which justified the necessity of exceptional measures. This became apparent when the government's restriction of the freedom of the press provoked a dispute between the government and the King's Court in Bombay in 1825. The origin of the issue was Governor General John Adam's licencing regulation for Calcutta in 1823.<sup>105</sup> This was criticised by reformer James Silk Buckingham, but his petition to the Privy Council was rejected, encouraging the Court of Directors to order the Bombay government to pass a regulation similar to the one in Calcutta. It was aimed 'for the prevention of the printing and circulating in newspapers ... matters tending to bring the Government of this country ... into hatred and contempt, and to disturb the peace, harmony, and good order of society'.<sup>106</sup> The Bombay government submitted it as Rule, Ordinance and Regulation I of 1826 to the Supreme Court for registration.<sup>107</sup>

The judges criticised the government's attempt to generalise the legislation which was initially intended to deal with a particular problem in Calcutta. In other words, the judges rejected the government's intention to normalise the emergency measure in times of peace. West said that there was not a similarly urgent situation in Bombay which justified the enactment in Calcutta. Charles Chambers, the puisne judge, also denied the existence of state necessity by saying that to introduce the measure at a 'time of perfect tranquillity' and 'not as a remedy for any existing or imminent evil but as a general and permanent act of legislation' was 'most prejudicial to the independence and good spirit of the community'.<sup>108</sup> In consequence, on 10

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<sup>105</sup> Cf. Partha Chatterjee, *The black hole of empire: History of a global practice of power* (Princeton, 2012), chapter 4.

<sup>106</sup> BL, IOR F/4/1241/40865, 7–10, BGL, CoD to Gov., 30 Dec. 1825.

<sup>107</sup> The proposed ROR I of 1826 was printed in *Oriental Herald*, 12 (1827), 211. See also *Asiatic Journal*, 23 (1827), 309–11.

<sup>108</sup> *Oriental Herald*, 12 (1827), 212–5.

July 1826, the Supreme Court refused to register the press regulation.<sup>109</sup>

The judges assumed that the press should be subjected only to the regular courts of law and not to the government's discretionary control. From this perspective, West also criticised a member of the council Francis Warden's proprietorship of the *Bombay Courier* and the *Bombay Gazette*. West explained that, although a proprietor was civilly and criminally answerable for the contents of the papers, Warden was exempted from it because the members of the council were not criminally amenable to the court.<sup>110</sup> This protest resulted in Rule, Ordinance and Regulation I of 1825 which ordered the registration of all the names of the proprietors of public journals as in England.<sup>111</sup>

#### IV. Conclusion

At the centre of these two cases of conflict over urban policing was the King's Court's insistence that the police administration should be managed by the legal procedures stipulated in the law and answerable to the judiciary, not by the discretion of the police officers. The arbitrariness of the police became a staple ingredient of the King's Court's attack on the government in subsequent years. For example, in 1828, Puisne Judge John Peter Grant gave his charge to the grand jury on the issue of police. He criticised illegal summary convictions and harsh punishments by the Company's magistrates, which was now familiar both to the grand jury and to the government:

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<sup>109</sup> Drewitt, *Memoirs of Edward West*, 227–30; *Oriental Herald*, 12 (1827), 201–16; BL, IOR P/346/29, BGC 19 July 1826, no. 43, G. Norton to Gov., 10 July 1826.

<sup>110</sup> Drewitt, *Memoir of Edward West*, 222.

<sup>111</sup> Cf. BL, IOR F/4/910/25702.

We are told that you are living under the laws of England. The only answer is that it is impossible. What has been administered till within a few years back has not been the law of England, nor has it been administered in the spirit of the law of England.<sup>112</sup>

This rhetoric was emulated in Britain. In 1831, Charles Forbes, a radical MP who had been the head of the powerful agency house, criticised the governor of Bombay in parliament for arbitrarily imprisoning criminals and denying them resort to habeas corpus of the King's Court.<sup>113</sup> The King's Court's logic of law provided a convenient tool to criticise the government's claim of state necessity.

Another important point was that the King's Court's civilian view of law and society was sharply contrasted with the government's political and militarist one. This contrast was especially important in Bombay in the 1820s when, as we shall see in Chapter 4, the government was still engaging in suppressing raids and rebellions in the mofussil. It was because of this difference of general vision of society that the King's Court could become the medium of criticising the government. This point became manifested not only in various reform movements, but also in ordinary proceedings of the suits in the court. The government and its officials could be sued as the defendant in civil suits in the King's Court. The court promulgated its identity as the constitutional check against the government through these cases, which are the theme of the next chapter.

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<sup>112</sup> Drewitt, *Memoirs of Edward West*, 291–3.

<sup>113</sup> *Asiatic Journal*, 6 (1831), 90–1; Parl. Debs. (series 3) vol. 6, cols 956–76 (1 Sep. 1831).

## Chapter 2: Indian merchants and civil trials of war and emergency

### I. Introduction

In the 1820s, the presidency towns of Calcutta, Madras and Bombay were becoming the centre of the ‘reform public’. As C. A. Bayly, Partha Chatterjee and others have shown, the ‘respectable’ Indian residents delivered their voices to the governments on a wide variety of topics ranging from its conduct of war to everyday commercial and ecclesiastical issues through the press, public meetings and petitions.<sup>1</sup> The British and the Indian population in 1820s and 30s presidency towns even briefly envisioned a participatory constitution based on the language of English liberty and through institutions of the free press and jury trials.<sup>2</sup>

The reform culture was most noticeable in Calcutta, which held a large number of Indian middle classes as well as Europeans, but that of Bombay was no less remarkable. The city developed its own cosmopolitan and reformist atmosphere which was distinctive to Calcutta and Madras. It was

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<sup>1</sup> C. A. Bayly, *Recovering liberties: Indian thought in the age of liberalism and empire* (Cambridge, 2012), chapters 1–4; Partha Chatterjee, *The black hole of empire: History of a global practice of power* (Princeton, 2012), chapters 4–7; P. J. Marshall, ‘The whites of British India, 1780–1830: A failed colonial society?’, *International History Review*, 12, 1 (1990), 26–44; S. N. Mukherjee, ‘Class, caste and politics in Calcutta 1815–38’, in Edmund Leach and S. N. Mukherjee (eds.), *Elites in South Asia* (Cambridge, 1970), 33–78; S. N. Mukherjee, ‘Daladali in Calcutta in the nineteenth century’, *Modern Asian Studies*, 9, 1 (1975), 59–80; Joseph Hardwick, ‘Anglican church expansion and colonial reform politics in Bengal, New South Wales and the Cape Colony, c. 1790–1850’ (London Univ. Ph.D thesis, 2008), chapter 5; Joseph Hardwick, ‘Vestry politics and the emergence of a reform “public” in Calcutta 1813–36’, *Historical Research*, 84, 223 (2011), 87–108; C. A. Bayly, *Indian society and the making of the British empire* (Cambridge, 1998), 68–76.

<sup>2</sup> Jon Wilson, ‘The silence of empire: Imperialism and India’, in David Craig and James Thompson (eds.), *Languages of politics in nineteenth-century Britain* (Basingstoke, 2013), 228–9.

based on the mixture of Hindu, Muslim, Parsi and Portuguese Christian merchants and their diaspora, and on the inheritance of bureaucratic and statistical skills of the Brahman elites of the Maratha empire.<sup>3</sup> Its public sphere was buttressed by the Indian intelligentsia which graduated from the Elphinstone College, originally established as the Bombay Native Education Society in 1824, and was coloured by the statistical and ethnographical discussions in the Bombay Literary Society (later the Bombay Branch of the Royal Asiatic Society).<sup>4</sup> The *Bombay Courier* (since 1790) and the *Bombay Gazette* (since 1791) were the two major English newspapers which contained advertisements, news on the arrival and departure of ships, correspondence on political and social issues, and the proceedings of the law courts. Its first Gujarati weekly newspapers *Bombay Samachar* was established in 1822 by the city's first vernacular printing press (est. 1812) held by Parsi printer Fardunji Marzaban. Its Marathi counterpart, *Bombay Darpan*, started in 1832.<sup>5</sup>

The judges of the King's Court in the 1820s, particularly Edward West and Charles Chambers, were sympathetic to the causes of reform. In addition to the reform of the police and the press, which we saw in Chapter 1, they supported, for example, the movement demanding Indians' participation in the grand jury. It was promoted in 1820s by reformers such as Rammohan Roy, Dwarkanath Tagore and Ram Raz in India and Joseph Hume and James Silk Buckingham in Britain, who were unsatisfied with the Indian Jury Act of 1826 by which Hindus, Muslims and Parsis were denied the ability to be grand

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<sup>3</sup> C. A. Bayly, 'Bombay's "intertwined modernities" 1780–1880', in Michael S. Dodson and Brian A. Hatcher (eds.), *Trans-colonial modernities in south Asia* (London, 2012), 231–48.

<sup>4</sup> Christine Dobbin, *Urban leadership in western India: Politics and community in Bombay city 1840–1885* (Oxford, 1972), chapters 1–2.

<sup>5</sup> Anant Kakba Priolkar, *The printing press in India: Its beginnings and early development* (Bombay, 1958), 72, 78–9

jurors and only admitted to be petit jurors when both parties were non-Christians.<sup>6</sup> Under this restricted situation, the Bombay judges tried to conciliate the leaders of these religious groups as far as possible by asking them to present their suggestions on the duties and mode of selection of the petit jurors and to furnish lists of eligible persons to be selected.<sup>7</sup>

This chapter considers the role of the King's Court in Bombay's reform culture further by examining the court's protection of Indian property from the government's expropriation in times of war. There were two important cases in Bombay in the 1820s. In the first case, a Parsi merchant sued the government for breach of contract during the Second Maratha War (1803–5). In the second case, a Hindu merchant filed a suit to recover personal property that was confiscated as wartime booty in the Third Maratha War (1817–8). In both cases, the King's Court ruled in favour of the merchants. The government appealed to the Privy Council in London, the final tribunal of the appeal from the colonies. Tories and radicals in London disputed the cases, and the fluctuating party politics of the late 1820s and the early 1830s in Britain affected their result. In the end, the King's Court's decisions in Bombay were overturned in London. Nonetheless, the effect of these cases was not small. The Indians became confident that the King's Court would support their claims, while the government feared that their authority would be impaired and a huge amount of losses would be incurred for compensation in the future. These cases not only testify the fragility of property right in India in the face of expropriation,<sup>8</sup> but also clearly indicate that the King's Court's civilian

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<sup>6</sup> Lynn Zastoupil, *Rammohan Roy and the making of Victorian Britain* (Basingstoke, 2010), 117; Bayly, *Recovering liberties*, 61–71.

<sup>7</sup> Frederic Dawtrey Drewitt, *Bombay in the days of George IV: Memoirs of Sir Edward West, with hitherto unpublished documents* (second edition, London, 1935), 248–52.

<sup>8</sup> Cf. Mariam Dossal, *Theatre of conflict, city of hope: Mumbai 1660 to*



criticism was problematic for the government which was anxious to retain the power of military discretion in times of war and emergency. Because of this, the cases developed into an overt conflict between the King's Court's commercial and liberal constitutionalism and the government's garrison state militarism.

## II. Jurisdictional jockeying of Bombay merchants: The case of Cursetjee Manockjee

The first case is *Cursetjee Manockjee v. EIC*.<sup>9</sup> Manockjee, a Parsi merchant, became the government contractor for the provision of rice in December 1802. In the next year, the Second Maratha War broke out. Arthur Wellesley (later Duke of Wellington) requested the Bombay government to supply rice by for his Madras army, then stationed at Poona. Manockjee sold rice at the market rate, which was two rupees per bag cheaper than the contract rate, because he was told that it was not for public use. However, he later realised that the rice was being supplied to the army and demanded compensation in 1804. This conflict, known as 'the rice case', continued for more than 25 years.

Cursetjee Manockjee was an important figure in the government's war efforts. In addition to rice, he was in charge of supplying clothes, food,

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*present times* (New Delhi, 2010), chapter 5: 'Law and the Acquisition of Land for Public Purpose c. 1830–60'; Debjani Bhattacharyya, 'History of eminent domain in colonial thought and legal practice', *Economic and Political Weekly*, L, 50 (2015), 45–53. See also, Daniel Skinner and Leonard Feldman, 'Eminent domain and the rhetorical construction of sovereign necessity', *Law, Culture and Humanities* 11, 3 (2015), 393–413; Julian Hoppit, 'Compulsion, compensation and property rights in Britain 1688–1833', *Past and Present*, 210 (2011), 93–128.

<sup>9</sup> Bayly briefly mentioned the Cursetjee case in his *Recovering liberties*, 82–3.

military goods and ballast to various government departments.<sup>10</sup> As Randolph Cooper has shown, the EIC's military logistics increasingly relied on Indian-based military manufacturing, and the government had to be sensitive to its relationship with civilian contractors such as Manockjee.<sup>11</sup> Furthermore, he was also important as a leader of the Parsis in Bombay, who dominated the city's commercial activities, such as shipbuilding and cotton, silk and opium trade with China.<sup>12</sup> He was a member of the Parsi Panchayat ('council of elders') which governed their social and religious life between 1818 and 1845. So the government's relationship with the business community was also potentially destabilised by this prolonged conflict.

Manockjee resorted to the King's Court when his claim was repeatedly rejected by the government. He sent several petitions to the government demanding for the principal sum of Rs 1,48,000. The Bombay government only admitted Rs 12,500. Manockjee also sent a petition to the Court of Directors in 1809, but they just increased the amount to Rs 43,500 in 1814. Manockjee finally instituted a suit in the Recorder's Court in 1820.<sup>13</sup> Cursetjee's clash with the government was not confined to the rice case. He used multiple legal methods to realise his demands. First, he filed an equity suit in the Recorder's Court for his distillery claim, which was settled in his favour.<sup>14</sup> Second, he claimed compensation for barracks which he built during

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<sup>10</sup> BL, IOR P/358/10, Bombay Military Consultations [hereafter BMC] 25 June 1823, 3655–60, Gov. to G. Norton, 21 June 1823.

<sup>11</sup> Randolph G. S. Cooper, 'Beyond beasts and bullion: Economic considerations in Bombay's military logistics 1803', *Modern Asian Studies*, 33, 1 (1999), 159–83.

<sup>12</sup> Jesse S. Palsetia, *The Parsis of India: Preservation of identity in Bombay city* (Leiden, 2001), chapter 1.

<sup>13</sup> BL, IOR L/MIL/3/1725, Bombay Military Letter [hereafter BML], Gov. to CoD, 25 Mar. 1825.

<sup>14</sup> This was his claim of damage as the arrack farmer when the revenue farming was replaced by the government's abkari tax collection in 1807. See

the Second Maratha War. This was settled in 1825 by arbitration and the government paid Rs 2,40,000, including 6% compound interest.<sup>15</sup> Third, he filed a suit in the Recorder's Court against the government for his provision of sandals during the war. He demanded Rs 15,000, but the ruling was in favour of the EIC.<sup>16</sup> Manockjee's legal cases show that the colonial court of law often combining multiple jurisdictions (or 'sides' such as plea or civil side, crown or criminal side, ecclesiastical side, equity side and admiralty side) allowed Indians to forum shop, in addition to the jurisdictional jockeying between different courts of law (the EIC court, panchayat, or the King's Court).

The point is that Manockjee was well acquainted with British legal procedures. He could use various legal tools to claim his demands both inside and outside the court. He filed his claims in multiple divisions in the Recorder's Court, and at the same time he sought alternative dispute resolutions outside the court. Arbitration was his preferred method. In the barrack claim, he proposed that he would accept a pension instead of reducing the rate of interest. In the rice case, he proposed that he would accept the result of the trial if the government would abandon their appeal to the Privy Council. In these endeavours, Manockjee worked with his attorney, Frederick Ayrton, whose critical attitude towards the government was notorious.

Manockjee succeeded in the Recorder's Court, but only the second time.

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BL, IOR F/4/321/7314.

<sup>15</sup> The government admitted it not on the ground of law, but as a gratuity. BL, IOR L/L/Box 620 (92), Appendix to respondent's case, Francis Warden to the Secretary and Translator in the Office of Country Correspondence, 4 Dec. 1809.

<sup>16</sup> BL, IOR, L/MIL/3/1725, BML, Gov. to CoD, 17 Feb. 1826; BL, IOR L/MIL/3/1726, BML, Gov. to CoD, 24 Feb. 1827. The government was preparing a counterclaim on this case, amounting to Rs 2,25,000, but it was abandoned as the sandal claim was settled in favour of the government.

The case was first examined by Recorder Anthony Buller in 1822. Buller did not admit compensation for supply to the Madras army and awarded Rs 47,000 with 6% simple interest, or a total of Rs 1,00,000. Manockjee applied for a new trial. It was held in 1823 before Edward West, the newly arrived recorder. In the trial, West overturned all objections of the government and judged in favour of Manockjee.<sup>17</sup> He awarded the full principal of Rs 1,48,000 with 9% compound interest, which amounted to Rs 5,27,000 in total. It was significantly higher than Buller's former award.<sup>18</sup>

The judgement was characterised by two points. First, West presented the King's Court as the defender of Indians from the oppression of the government. He suggested that the government treated Manockjee 'throughout the whole of the business most unjustly ... [and] shamefully'. He emphasised the timidity of Indians facing the tyranny of the EIC. For them, the 'government and despot are synonymous'; he could 'readily believe that nothing but the severe distress, or the grossest injustice' drove him to legal actions.<sup>19</sup> In such a situation, the *raison d'être* of the King's Court was as follows:

I cannot allow it to be supposed for a moment that in this Court, the King's Court instituted as it has been by the Crown and Legislature of Great Britain, mainly for the very purpose of giving the natives of this country redress against the Company and the Company's servants, I say I cannot allow it to be surmised that the meanest or poorest native would not at any period of the existence of this Court obtain a full measure of

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<sup>17</sup> The EIC's defence was based on three points: that Manockjee waived his rights under the contracts by acting under Major Moor; that Manockjee lost his remedy by his negligence in bringing the claim in earlier time; and that the purchased rice was supplied for the Madras troops and therefore not within the contract.

<sup>18</sup> *Oriental Herald*, 3 (1824), 267.

<sup>19</sup> *Ibid.*, 269.

justice against the Government.<sup>20</sup>

This formulation of the court's role as the constitutional check against the government's oppression of the Indians became the ideological basis of the judicial review over the conduct of the government in the 1820s.

However, this did not mean that West was totally in favour of Manockjee. Manockjee explained that the delay in filing the suit was partly due to his having sought redress from the Court of Directors in Britain. He tried to use every means to recover his damages and did not regard the King's Court as the only means of redress. Rather, the structure of dual or multiple powers was essential for his judicial and political manoeuvring, because he could resort to an authority to challenge another. However, the judge criticised his jurisdictional jockeying, saying 'this Court was always open to him'.<sup>21</sup> In contrast to Manockjee's judicial pluralism, West insisted that the King's Court was the only supreme tribunal in the presidency. West's conception of the King's Court as the defender of natives was accompanied by his assertion that the King's Court held sovereign status in the presidency.

But West's assertion of the court's sovereignty was followed by his limitation of English law. West based his argument on Indian practices and usages, rather than English precedents. The issue was concerned with Manockjee's claim on the interest on unliquidated damages. According to English case law, he was not entitled to the interest, but West articulated that the court of law in India should not be hindered by English precedent, 'especially as a very different practice has prevailed in the Courts of India'.<sup>22</sup> West in fact went further and criticised the English practice of distinguishing

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<sup>20</sup> Ibid., 269–70.

<sup>21</sup> Ibid., 270.

<sup>22</sup> Ibid., 268.

the liquidated and unliquidated damages; he said such distinction originated more in technical forms of action, rather than difference in principle.<sup>23</sup> In this sense, West's judgement tried to revise and reform the English legal practice by referring to the Indian usages, and, in effect, advocated a system of Indian common law, distinct from the English one, which was to be formed by the King's Court.

This attitude was supported by the non-official community in Bombay. The other two aldermen judges, Benjamin Philipps and William Ashburner, decided more favourably than West on the matter of interest.<sup>24</sup> British merchants and lawyers testified in favour of Manockjee.<sup>25</sup> But, at the same time, it is possible that this kind of assertion of the role of the court stemmed as much from the judges' anxiety that the court should always impress and conciliate the powerful merchants—both Indian and British—of the presidency town, one of the main users and audiences of the King's Court.

Government officials expressed several concerns about the judgement. First, they argued that the trouble was caused by the 'litigiousness' of the Indians. Francis Warden, a member of the governor's council, commented that the Indians were not timid in making lawsuits against the government, as the chief justice claimed; on the contrary, they had well understood the value of the King's Court and had fearlessly gone to the court and made suits against the government in the same way as against a private individual.<sup>26</sup> Second, the officials were cautioned by the court's power to make a precedent. West's

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<sup>23</sup> Ibid., 268–69.

<sup>24</sup> They admitted interest between 1804 and 1815. West only admitted it between 1804 and 1809. Ibid., 269.

<sup>25</sup> BL, IOR L/L/Box 620 (92), Appendix to respondent's case, 21–23.

<sup>26</sup> Warden said the same tendency was observed in the *mofussil* as in the presidency. BL, IOR P/358/31, BMC 4 May 1825, no. 25, F. Warden, minute, 17 Apr. 1825.

award of compound interest consisting of one fourth of the total sum was problematic because, as the government's solicitor W. A. Morgan explained, the same high rate of interest would be awarded by the judge in other claims of Manockjee. Considering this, he recommended the government to settle the barrack claim in arbitration instead of an action at law, which was agreed by Elphinstone.<sup>27</sup>

But the government was most alarmed by the King's Court's interference in the military operation of the government in a time of war. The government contended that a contract made before war broke out should not be extended to the emergency supplies in a time of war. Manockjee insisted that the terms of contract should be broadly interpreted as including the supply in wartime and the government should compensate it, which meant that the King's Court could review the government's military discretion in times of emergency and order compensation retrospectively. Then, West's support for Manockjee's case would eventually check and weaken the power of the government to make any emergency interventions in times of war.

To make matters worse, the officials conceived that the judge had an erroneous understanding of the military constitution. Warden explained that, while the three presidencies were totally independent in terms of military command and economy and therefore the Bombay government was not responsible for any supply to the other presidencies, West assumed that the Indian army was one and the same and the damages incurred from supply to any army in any presidency should be compensated by the uniformly conceived 'British government' in India.<sup>28</sup>

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<sup>27</sup> Ibid., no. 20, W. A. Morgan to Gov., 31 Mar 1825; Ibid., no. 24, M. Elphinstone, minute, n.d.

<sup>28</sup> BL, IOR P/358/9, 3025–54, BMC 21 May 1823, F. Warden, minute, 14 May 1823.

On a deeper level, this different recognition of the military constitution indicates that the King's Court and the government had different views on the British sovereignty in India. West regarded that the governments in different presidencies constituting a unitary polity governing all over India. Further the government of India was identical with the government of England, and thus the territorial sovereignty of the British had already been established. Within that territory, the sovereign justice of the King's Court should be available for all King's subjects. On the other hand, the government's understanding of the British constitution in India was plural. The Bombay government was distinguished from the other governments of Madras and Calcutta. This assumption of plurality was related to the officials' view of Indian politics in general. It was based on the idea that the British government was essentially a regional power among other chiefs and sardars. It should certainly retain the paramountcy as the head of the confederacy, but the judicial system should be arranged in reference to the shared mode of sovereignty.

In order to deny the merchant's claim for interest and to retain its power of discretion in cases of emergency, the government prepared to appeal to the Privy Council, the final court of colonial legal affairs. The Privy Council's Appeals Committee consisted of all the members of the Council. The quorum was the Master of the Rolls and two other members. Its decision was promulgated by an Order in Council.<sup>29</sup> In the appeal paper, the government insisted that the terms of the contract could not be applied to 'an extraordinary and accidental supply of rice' to the Madras army. The judgement was 'contrary to the established rules of the law of England respecting the allowance of interest' as it awarded the compensation for the unliquidated

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<sup>29</sup> Peter Anthony Howell, *The judicial committee of the Privy Council 1833–1876: Its origins, structure and development* (Cambridge, 1979), 6–7.



damages.<sup>30</sup>

The appeal was granted in the Recorder's Court in June 1823, but the debate in the Privy Council did not start until June 1828. During the interval, Manockjee continued his negotiation with the government. First, Manockjee published an open letter to the governor of Bombay in the *Oriental Herald* to abandon the appeal, and also proposed lowering the rate of interest if the government would not appeal.<sup>31</sup> After these attempts failed and the appeal was lodged, he published an open letter to the Court of Directors in the *Oriental Herald* in December 1826. Manockjee actually demanded more in the letter. He requested that they order the Bombay government to pay the additional five years' interest, which was not awarded by the King's Court.<sup>32</sup> Manockjee was trying to pit the Company against the King's Court to increase the amount of compensation. Manockjee also tried to get support from a director of the EIC, John Morris, a former Bombay civil servant, though the letter was not answered.<sup>33</sup> On the government's part, the EIC's solicitor in London, Edward Lawford, was preparing with James Melville, clerk to committee of law suits of the EIC, for the discussion in the Privy Council's appeals committee.<sup>34</sup>

Meanwhile, radicals in London picked up the case as an example of the Company's oppression of the Indians. The main organ of their criticism was the *Oriental Herald*, a monthly journal edited by James Silk Buckingham, a

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<sup>30</sup> BL, IOR L/L/Box 620 (92), Case of the appellant, 14–5, the first and the fifth reason of appeal.

<sup>31</sup> *Oriental Herald*, 3 (1824), 270–4; BL, IOR P/358/9, 3025–54, BMC 21 May 1823, W. A. Morgan to Gov., 12 May 1823.

<sup>32</sup> *Oriental Herald*, 10 (1826), 578–88.

<sup>33</sup> BL, IOR L/L/Box 620 (92), unbound correspondence, 41–2, Cursetjee Monackjee to John Morris, 26 Jan. 1825. This letter was not answered.

<sup>34</sup> BL, IOR L/L/Box 620 (92), unbound correspondence.

central figure of colonial reformers in this period.<sup>35</sup> It reported West's judgement and Manockjee's open letter, and the editor also published an article titled 'Fraudulent and Disgraceful Transaction of the Bombay Government', in which he linked Manockjee's case with his cause of the freedom of the press in India.<sup>36</sup> As a response, Major Edward Moor, the garrison store keeper, defended his conduct in the next issue. His argument was based on the logic of state necessity. He emphasised that he could not deal with Cursetjee in the ordinary manner: the purpose of purchasing rice should be kept secret, as it was related with the movement of the army to Poona, enemy's capital, during the war.<sup>37</sup> In this way, Manockjee's case gradually became famous in London as well as in Bombay. In such a situation, the discussion in the Privy Council was held before Judge John Leach, whig Master of the Rolls.

First, it is important to note that the government's claim of military emergency was rejected by the court. It shows that the Privy Council cannot simply be equated with the 'colonial state'. J. B. Bosanquet, the EIC's standing counsel, emphasised that there was certainly 'a stipulation that the contractor shall not be bound in the case of such a sudden emergency to provide for such an extraordinary demand'.<sup>38</sup> But Judge Leach rejected the view, as it was not supported by the evidence submitted to the court.<sup>39</sup> He decided that Manockjee was entitled to full compensation for the principal.<sup>40</sup>

As for the interest, however, the Privy Council reversed the decision of

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<sup>35</sup> Bayly, *Recovering liberties*, chapter 2–3.

<sup>36</sup> *Oriental Herald*, 3 (1824), 189–200.

<sup>37</sup> *Ibid.*, 402–9.

<sup>38</sup> BL, IOR L/L/Box 620 (92), Proceedings of Privy Council debates, ii, 55 (14 June 1828).

<sup>39</sup> *Ibid.*, 57, 63, 81–2.

<sup>40</sup> BL, IOR L/L/7/761, Copy of judgement at the Privy Council by the Master of the Rolls, 21 Jun 1828, 2–3.

the Recorder's Court. The debate in the chamber was decidedly moralistic on this matter, chiefly due to the speech of Thomas Denman, counsel for Manockjee, who embodied the age of reform in the legal world.<sup>41</sup> He criticised the case for being detrimental to the confidence of Indians towards the British legal system, stating that 'the forbearing creditor' should be compensated by 'the fraudulent debtor', or otherwise it would induce creditors to instantly resort to a legal action without giving their opponents a chance to settle the issue.<sup>42</sup> But Judge Leach was not persuaded. He argued that the interest on the unliquidated damages should not be allowed, because

if such a usage had prevailed, it is the duty of this court as the court of ultimate Appeal from India, to reform that usage and to declare that without the special authority of the Legislature in this country such a usage if it had prevailed would have been illegal.<sup>43</sup>

This self-proclaimed role as the reformer of Indian legal practice led the Privy Council to reject the Manockjee's argument. Leach was not an enthusiastic reformer in Britain,<sup>44</sup> but his whiggish defence of British legal practice resulted in the reform of Indian practice. This Privy Council decision relieved

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<sup>41</sup> Denman was a whig lawyer, common serjeant of London, who supported the Irish cause, criminal law reform, fight against corruption and abuses, and above all, abolition of the slave trade. He drafted the first reform bill as Attorney General in 1831. Gareth H. Jones, Vivienne Jones, 'Denman, Thomas, first Baron Denman (1779–1854)', *ODNB*; online edn, May 2009 [<http://www.oxforddnb.com/view/article/7495>, accessed 23 Jan. 2016].

<sup>42</sup> IOR/L/L/Box 620 (92), Proceedings of Privy Council debates, III, 58–59, 95–97 (14 June 1828).

<sup>43</sup> IOR/L/L/7/761, Copy of judgement at the Privy Council by the Master of the Rolls, 21 Jun 1828, 4.

<sup>44</sup> He later opposed Lord Chancellor Lyndhurst's reform of the equity judge and Brougham's reform of setting up the judicial committee of the Privy Council. Michael Lobban, 'Leach, Sir John (1760–1834)', *ODNB*; online edn, Jan. 2008 [<http://www.oxforddnb.com/view/article/16228>, accessed 23 Jan. 2016].

the Court of Directors, who were anxious about West's judgement which was 'a doctrine of such dangerous tendency and so subversive of all the means of check and controul established by the constitution'.<sup>45</sup> As a result of the decision, compensation for Manockjee was reduced from Rs 5,27,000 to Rs 1,48,000. Manockjee petitioned to the next governor, John Malcolm, to reverse the Privy Council's decision, as it was 'given either in total ignorance or direct disregard of the established usage and practice'. However, the governor did not listen and decided that Manockjee should refund the money to the government in 18 years with annual payments of Rs 25,000.<sup>46</sup>

Despite the failure of realising its claim, the case of Cursetjee Manockjee was important as an initial attempt of Bombay merchants' resorting to the King's Court to challenge the government. It heightened the government's anxiety about the King's Court's interference, especially because they feared that their conduct in wartime would be shackled by the independent civil authority's inspection. This contrast of civil and military visions of Indian politics was more noticeably disputed in the next case between another Bombay merchant and the government.

### III. Refuting the government's militarist logic of emergency: The case of Amerchund Bedreechund

The other notable case in which a Bombay merchant/banker sued the EIC and its higher officials was the case of *Amerchund Bedreechund v. Mountstuart Elphinstone, Henry Dundas Robertson and the East India Company*. The

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<sup>45</sup> BL, IOR L/L/Box 620 (92), CoD to Gov., 15 Oct. 1828.

<sup>46</sup> BL, IOR L/L/7/761, C. Monackjee to Gov., 8 July 1829, and C. Monackjee to CoD, 23 Aug. 1831.

process was similar to the Manockjee case: the native merchant petitioned the government to realise his demand; the government rejected it; the merchant resorted to the King's Court; the King's Court decided in favour of the merchant; the government appealed to the Privy Council; the Privy Council reversed the decision of the King's Court. The King's Court's interference in the military affairs was also the main issue of dispute. The contrasting visions of Indian society became a focus of debate in the court room, and the government's military conception of society was challenged by the King's Court's civilian perspective.

The case originated in the capture of a peshwa's treasurer during the Third Maratha War (1817–18). In 1817, Narroba Outia, the treasurer, was in charge of the fort at Rhygur when it was besieged by British troops. Narroba agreed to the terms of capitulation and surrendered the fort; the treasure was captured by the British army. However, Captain Robertson, the collector, judge and magistrate of Poona, suspected that Narroba hid some of the treasure in his house at Poona. Robertson searched Narroba's house and found a large sum of gold. Robertson seized it as booty of war. Narroba claimed it was his private property, demanded compensation and started to complain about the harsh treatment he received from Robertson. Narroba sent petitions to the Deccan Commissioner, William Chaplin, who made an inquiry in November 1819 and rejected Narroba's claim. Narroba filed a suit in the Recorder's Court in 1822 but died soon afterwards and the case was not heard. His trustee, Ameerchund Bedreechund, sued the EIC in the Supreme Court in 1826. Bedreechund was a Hindu banker and merchant dealing with piece goods, joys, jewels and precious stones both in Bombay and Poona.<sup>47</sup> He was

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<sup>47</sup> Maharashtra State Archives [hereafter MSA], High Court Record, Supreme Court equity bundle, 1829, no.97/82–86.

the agent of the peshwa sent to Bombay to purchase grain in the famine of 1803–4.<sup>48</sup>

There were two separate cases in the King's Court, both judged in favour of Bedreechund. One was the case of criminal prosecution of Bedreechund. It was a long-pending case. In 1820, the Advocate General, Ollyett Woodhouse, exhibited an criminal information, on behalf of the king, against Amerchund, to recover the damage of principal sum of Rs 48,00,000, which was alleged to have been deposited to Amerchund by the peshwa before the war. In April 1825, Judge West rejected the government's allegation and gave a verdict in favour of Amerchund.<sup>49</sup>

The decision of *King v. Bedreechund* shows one prominent feature of the conflict between the government and the King's Court: the King's Court judges fully utilised their power to admit or reject the evidence. The formal allegations of the prosecutor were all disapproved by the court. These included the allegation that a war existed between the Company and the Peishwa; that 'the Peishwa held the sovereign power over a large part of the Deccan, a country situated within the peninsula of India, and adjacent territories' of the Company; that 'the whole of his territories, and all his rights of sovereignty, were, by conquest and right of war, transferred to the King of Great Britain'. West explained the procedural justice of the court in admitting or rejecting the evidence:

It is quite clear, that the rules of law require that all facts should be proved, of which the Court cannot take judicial notice, however

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<sup>48</sup> Robert Henshaw, *The whole proceedings on the trial of an information exhibited at the instance of the ... East India Company against R. Henshaw, ... Custom-master of Bombay for corruption in office, and receiving presents; ... tried ... in the Court of the Recorder of Bombay, etc.* (Edinburgh, 1807), 21–2.

<sup>49</sup> *Oriental Herald*, 9 (1826), 190–200.

notorious those facts may be. ... Nothing, indeed, would produce greater uncertainty and more confusion than to allow Judges to take judicial notices of facts, because they are said to be notorious.<sup>50</sup>

But this was not a mere machination of the judge. The requirement of precision was, according to Lobban, an essential tradition of the common law as a system of remedies.<sup>51</sup> West further argued that as the judges perform the role of a jury as well as a court, they alone were competent to decide upon the credibility of witnesses and other facts upon which the verdict of a jury is final.<sup>52</sup> The judges employed this ruling of their sole authority to decide on evidence in the main trover case.

The trial of *Amerchund Bedreechund v. Elphinstone, Robertson and the EIC* was decided in favour of the plaintiff. Bedreechund employed James Morley, notorious for his anti-government attitude, and G. F. Parry as his counsel. The Company was defended by George Norton, Advocate General, G. I. Irwin (the next Advocate General), and A. S. Le Messurier. This meant that five out of the seven barristers in Bombay were involved in the case. The judgement was given in November 1826. Morley argued that the defendants were guilty of exercising illegal authority; Robertson's atrocity was comparable to the deputies of the French Revolution. However, he continued, this trial would prove that the Supreme Court had the authority to redress their injustice; hundreds of similar cases were to be applied and thousands of people would come to complain their torts against the Company, even from the independent princes of Hyderabad and Nagpur.<sup>53</sup> Morley's hostile speech

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<sup>50</sup> Ibid., 194–5.

<sup>51</sup> Lobban, *Common law*, 71–4. Lobban referred to a case in Dublin in 1819 in which the currency in dispute was English

<sup>52</sup> *Oriental Herald*, 9 (1826), 195.

<sup>53</sup> BL, IOR P/386/13, Bombay Political Consultations [hereafter BPC], 6 Dec. 1826, no. 57, G. Norton to Gov., 30 Nov. 1826.

openly denying the government's judicial authority worried the government, especially because it was made in a court full of Indian inhabitants. But Edward West, the chief justice, and Charles Chambers, the puisne judge, endorsed this view and gave a judgement in favour of Bedreechund. The court ordered the defendants to pay Rs 17,50,000, with costs of Rs 16,000.<sup>54</sup>

The judgement was based on the judge's logic of law as opposed to the government's militarism. West argued that the government's seizure of Narroba and his property occurred after the end of the war. Citing Lord Mansfield, West argued that Poona was already in a state of peace because: (1) a proclamation had been issued by Governor Elphinstone, which promised that 'all property, real or personal, will be secure', and (2) the courts of justice had been introduced embodied in the person of Robertson, who was appointed the judge of the Company. Therefore, Narroba had ceased to be an alien enemy when he was captured, and thus he should have been under the protection of the government as a King's subject. West added that the seizure was not based on *jure belli*, since Narroba was under the protection of the conqueror, and rejected the government's claim that the seizure was done *bona fide* as booty.<sup>55</sup>

The judges' most important argument was that the King's Court had jurisdiction over the government's military operation. West articulated that the acts of a government were subject to the jurisdiction of municipal courts. In order to emphasise the tyrannical nature of the claim of the government, he quoted Mansfield's judgement in *Fabrigas v. Mostyn*, which stated that 'to

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<sup>54</sup> The judgement is printed in the *Oriental Herald*, 14 (1827), 1–40; John Macdonell (ed.), *Reports of State Trials, new series, volume 2, 1823 to 1831* (London, 1889), 370–458 [hereafter 2 State Trials]. Citations below are from the former.

<sup>55</sup> *Oriental Herald*, 14 (1827), 19–21.



maintain here that every governor, in every place, can act absolutely; that he may spoil, plunder, affect their bodies and their liberty, and is accountable to nobody, is a doctrine not to be maintained'.<sup>56</sup>

Judge Chambers went further to insist that it was not the government but the King's Court that had the power to decide 'exceptions' from ordinary laws. He admitted that the officers should be allowed latitude of conduct in times of war, but this should not be applied in every case: 'such exceptions, however, when they occur, must be shown to rest upon their proper and distinct grounds, and cannot be presumed to be right unless the particular expediency or necessity is pointed out'.<sup>57</sup> In other words, if the King's Court declared so, any acts of the government in times of war could be amenable to its jurisdiction. These arguments by West and Chambers were important, as they would enable the King's Court to check the government's wartime activities retrospectively. This assertion of military jurisdiction generated a strong sense of danger among the government officials.

The problem was that, as in the case of Manockjee, the government could not prove that a state of war existed according to the court's rulings of evidence, and therefore could not protect its officers from the suit in the King's Court. Advocate General Norton reported that much of the defendant's evidence was unfairly rejected by the court. For example, the correspondence of the government officials and even the government's proclamation in the Deccan were rejected because the originals were not produced, while that of the plaintiff, such as John Malcolm's despatch to notice the surrender of the peshwa, was admitted. He explained that since it was almost impossible to prove the very existence of war, and thus the rights of war and conquest, all

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<sup>56</sup> Ibid., 22–3.

<sup>57</sup> Ibid., 30–1.

future proceedings of the EIC servants in these emergencies were to be judged by the mere municipal law, rather than as acts of state in *bona fide* execution of the rights of war.<sup>58</sup>

Furthermore, Elphinstone had to worry about a more direct surveillance of the military operation, as Bedreechund demanded the government produce its confidential papers relating to the war as evidence. Elphinstone cautioned that ‘if the records of every department are once placed at the mercy of every attorney who makes an application to the Supreme Court, there can be no secrecy in any affair, foreign and domestic, and no confidence in our own deliberations, or in the persons with whom we have to communicate in any transaction’.<sup>59</sup> Elphinstone’s anxiety was based on his understanding that the Deccan was still in a state of war. He pointed out that the judges had a false view of the state of Poona. It was ‘the turbulent capital of a country of which the conquest was still in progress’.<sup>60</sup> In such a situation, the priority of the government in the area was to maintain its tranquillity, and thus the government’s military operation should be free from the vigilant eyes of the King’s Court.

Elphinstone anticipated a difficult situation in which the government officials would be involved in the future. He vindicated Roberson’s conduct in the ‘arduous situation at a season between war and peace when he was neither safe from the plots of the enemy nor from the scrutiny of a municipal court—he had not regulations to direct him and is attacked for following the

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<sup>58</sup> BL, IOR P/386/13, BPC 6 Dec. 1826, no. 57, G. Norton to Gov., 30 Nov. 1826.

<sup>59</sup> Thomas Edward Colebrooke, *Life of the Honourable Mountstuart Elphinstone* (London, 1884), ii. 182, M. Elphinstone, minute, 19 Sep 1826.

<sup>60</sup> BL, IOR P/386/18, BPC 14 Feb. 1827, no. 96, M. Elphinstone, minute, [22 Jan. 1827].

practice of the Marrattas by which alone he could be guided'.<sup>61</sup> In other words, if they could not sufficiently enforce their military control, they would be preyed on by their enemies; but if they were too vigilant and too strict in following the military (Maratha) way of rule, they could be prosecuted in the King's Court. Elphinstone feared this legal anomaly in which the government officials would be left with little scope to achieve the just balance of their military manoeuvre.<sup>62</sup>

The case of Amerchund Bedreechund raised another important concern among the government officials which was not observed in the case of Cursetjee Manockjee: the summons of witnesses from the mofussil to Bombay city. First, the summonses were disliked by the Indian witnesses as they were costly and inconvenient. The total cost incurred by witnesses amounted to Rs 13,000, which was to be paid by the government. Besides, they experienced 'much personal inconvenience from being removed from their homes in the rains, and obliged to live for two months in a place where they were strangers and whose climate and impurities those of them who were Bramins greatly disliked'.<sup>63</sup> Also problematic was the summonses of the government officials, which was disruptive of their duties in the mofussil. Norton reported that after the collector of Sholapore was examined by the court, he applied to return to his station, but West refused to grant permission.<sup>64</sup>

But the government was most alarmed by the summons of the *sardars* (Indian aristocrats). As we shall see in Chapter 4, the government exempted them from the Company's Court. But in the case of Bedreechund, the King's

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<sup>61</sup> Ibid.

<sup>62</sup> Cf. Hussain, *Jurisprudence of emergency*, 105.

<sup>63</sup> BL, IOR P/386/19, BPC 21 Feb. 1827, nos. 17–19, H. D. Robertson to Gov., 25 Jan. 1827.

<sup>64</sup> BL, IOR P/386/13, BPC 6 Dec. 1826, no. 57, G. Norton to Gov., 30 Nov. 1826.

Court summoned the *sardars* and their subordinates to Bombay, including the most powerful of them, Chintaman Rao Patwardhan.<sup>65</sup> If they refused to attend, they might be prosecuted for contempt of court. The government was particularly concerned about the complaints made by the rajas of Satara, the descendant of the Chatrapati Sivaji, and Vinchorekur, the most important sardar in the Deccan Khandesh. When the servants of the raja of Satara were summoned, the raja expressed his surprise that it was issued without any previous intimation. The government stated that it would prevent its recurrence and solicited him to send the witnesses to Bombay. The raja did so, but further complained that the judicial business in his court was delayed by it.<sup>66</sup> The raja of Vinchorekur was also told by the agent of Bedreechund that he himself would be summoned. He complained to the government that ‘this was a great innovation, and that the chief’s dignity would be entirely ruined in the world should he be obliged to appear at the bar of the court at Bombay’.<sup>67</sup> Eventually the agents of Amerchund said they would summon not the raja himself but only two of his karkoons. The raja sent another presentment to the government, in which he stated that ‘I am not in the situation of a private individual, but a Sirdar, such being the case, should such proceedings continue to be adopted towards me, then how will my respectability be preserved’?<sup>68</sup>

Receiving these reports, Elphinstone expressed his grave sense of danger. He said these proceedings would certainly convince the *sardars* that

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<sup>65</sup> The National Archives [hereafter TNA], TS 11/123, Privy Council Printed Papers, Appendix.

<sup>66</sup> BL, IOR P/386/19, BPC 21 Feb 1827, no. 77, J. Briggs, Resident at Satara, to Gov., 26 and 29 Aug. 1826.

<sup>67</sup> Eventually the raja was not summoned. BL, IOR P/386/19, BPC 21 Feb 1827, no. 77, W. H. Wathen, Persian Secretary, to Gov. with translate of representation from Vinchorekur’s vakeel, 24 Aug. and 1 Sep. 1826.

<sup>68</sup> Ibid.

the Supreme Court could threaten them and the government had no power to prevent it. In consequence, he continued, chiefs would feel considerable uneasiness at the Supreme Court's 'exercise of sovereignty' within their territories and think that the King's Court was equal to the government. He concluded that 'a good deal of the ferment in the Deckan was produced by the general circulation of these summonses'. But, at the same time, he could do nothing but recommend the sardars to obey the summonses, as these summonses were 'issued as a mere matter of course by an officer of the court without the judges having the least control over the issue of them and that this is the established practice of the court'.<sup>69</sup>

Indeed, Elphinstone anticipated that the King's Court's interference would provoke a collapse of the EIC's rule in the *mofussil*. He drafted a despatch to the Court of Directors to obtain an immediate redress.<sup>70</sup> He warned that a false impression was spread in the Deccan that all who were opposed to the government would be supported by the Supreme Court. He predicted that 'great confusion will be produced ... [and] it will be necessary for us to keep up a more vigilant control over the Chiefs and to alter our plan of government to one of great strictness in all respects'. Elphinstone referred to an example of the raja of Kolhapur, who was reported to apply to the Supreme Court to set aside his peace treaty with the government.<sup>71</sup> He cautioned the Court of Directors that the notion of the jurisdiction of the Supreme Court was so erroneous to allow it to 'interfere in questions purely political', and the court would certainly interfere in all such questions with

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<sup>69</sup> BL, IOR P/386/19, BPC 21 Feb 1827, no. 77, M. Elphinstone, minute, 23 Jan. 1827.

<sup>70</sup> BL, IOR P/386/13, BPC 6 Dec. 1826, no. 58, M. Elphinstone, minute, 30 Nov. 1826.

<sup>71</sup> For Kolhapur, see Chapter 5.

reasonable outlook. In another minute, Elphinstone worried that the Indians even believed the alteration of the government from the EIC to the Supreme Court at the expiration of the charter in 1834.<sup>72</sup> These comments illustrate the location of the sense of crisis caused by the King's Court in the *mofussil*: it would unleash the disloyal rallying of the independent chiefs and *sardars* around the King's Court to challenge the government.

On his part, Bedreechund was rapid in reaping the benefit of the judgement. Immediately after the judgement, he petitioned the government about a case filed against him in the adalat. Amerchund insisted that the register or Deccan Commissioner did not have any legal power to act as a judge, as the King, not the EIC, was the sole judicial authority in the Deccan, which was admitted by the Supreme Court. The government declined the petition, and decided that the trial was to be held at the Poona adalat as usual.<sup>73</sup>

Considering these points, the government could do nothing but to appeal to the Privy Council.<sup>74</sup> Bedreechund had died soon after the judgement of the Supreme Court, and now his cause was succeeded by his trustees, Heerachund Bedreechund and Jetmul Anoopchund. They employed reformist lawyers in Britain in the same way as Cursetjee Manockjee did. Their agent in London was solicitor John Hopton Forbes, a relation of radical MP Charles Forbes. John Williams, KC, a staunch whig MP, and Thomas Denman, the counsel for Cursetjee Manockjee, spoke for Bedreechund and Anoopchund in

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<sup>72</sup> BL, IOR P/386/13, BPC 6 Dec. 1826, no. 60, Elphinstone, minute, 1 Dec. 1826.

<sup>73</sup> BL, IOR P/399/45, Bombay Judicial Consultations [hereafter BJC], 27 Apr. 1825, no. 23, William Chaplin to Gov., 15 Apr. 1825.

<sup>74</sup> 2 State Trials, 410–50; Jerome W. Knapp, *Report of cases argued and determined before the judicial committee and the lords of His Majesty's most honourable Privy Council, appointed to hear appeals and petitions, volume 1 1829–1831* (1831), 316–61 [hereafter 1 Knapp].

the court.<sup>75</sup> The judge was Lord Tenderden, the high tory Lord Chief Justice. The government asserted that the King's Court, as the municipal court, did not have jurisdiction over the military conduct of the government and that their evidence was unfairly rejected. The Bedreechund side reiterated that the property was Narroba's and that the seizure was civilly illegal as it was done in peacetime, not war.<sup>76</sup> The judgement was given in July 1830. The Privy Council overturned the decision in Bombay.

It seems that party politics influenced the decision of the case. The course of debate was determined by the intervention of Attorney General James Scarlett, newly converted tory lawyer/politician and protégé of Wellington, whose influence over Tenderden was notorious.<sup>77</sup> He made a long speech in favour of the EIC, emphasising that the Supreme Court did not have jurisdiction over the conduct of Robertson, as he was a military officer rather than a civil administrator who was amenable to a municipal court.<sup>78</sup> Accordingly, Lord Tenderden judged in favour of the Bombay government, saying that the seizure was made in a time of war over which a municipal court had no jurisdiction.<sup>79</sup> In this way, the tory Privy Council endorsed the military ideology of the Bombay government.

Bedreechund and Anoopchund did not abandon their cause there. They

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<sup>75</sup> On behalf of the appellants, George Maule, solicitor for the treasury, Edward Lawford, solicitor for the Company, and James C. Melville, clerk of the EIC's committee of law suit, both also involved in the case of Manockjee, prepared the appeal cases in London. Elphinstone, now back in Britain, also corresponded with Lawford. Edward Sugden, newly appointed Solicitor General, and William Wightman, junior counsel to the Treasury, were the counsels in the trial. BL, IOR L/L/Box 54 (386).

<sup>76</sup> TNA, TS 11/123; 2 State Trials, 409–10.

<sup>77</sup> G. F. R. Barker, 'Scarlett, James, first Baron Abinger (1769–1844)', rev. Elisabeth A. Cawthon, *ODNB*; online edn, Jan. 2009

[<http://www.oxforddnb.com/view/article/24783>, accessed 23 Jan. 2016].

<sup>78</sup> 2 State Trials, 434–49.

<sup>79</sup> *Ibid.*, 449–50.

connected the Bedreechund case with a larger political controversy over the distribution of the Deccan Prize Money.<sup>80</sup> A month after the judgement, Bedreechund and Anoopchund petitioned the trustees of the Deccan booty, the Duke of Wellington and Charles Arbuthnot, and demanded to suspend its distribution, as it was partly Narroba's private property. This eventually led to another meeting at the Privy Council.<sup>81</sup> Tenterden again rejected their argument.<sup>82</sup> Wellington's influence was not small in this case as in others.<sup>83</sup> He demanded the full attendance of the councillors at the meeting,<sup>84</sup> which was important because every councillor had an equal vote.<sup>85</sup> This time, his protégé Scarlett was the counsel for the Bombay government. So Elphinstone and Robertson got strong support from Wellington and his legal ministers who could dominate the Appeals Committee.

Like Manockjee, Bedreechund and Anoopchund collaborated with the radicals in Britain. The case was reported in the *Oriental Herald* with comments by Buckingham. He argued that it exemplified the deficiency and corruption of the Company's judicial system in the *mofussil* run under

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<sup>80</sup> The Deccan Prize Money case was a conflict over the distribution of the Deccan booty acquired during the Third Maratha war. Sir Thomas Hislop, Commander-in-Chief of the Deccan Army, and Marquise Hastings, Governor General and the Commander-in-Chief of the Grand Army, contested for their share of the booty. Hislop contended the whole booty should be allocated to the Deccan army, which actually captured the booty, as his army was independent of the General Army; Hastings insisted that the Grand Army and the Deccan Army was a combined army under his general command, and thus the Deccan army should be allotted only one eighth of the booty. It was decided by the Lords of the Treasury in favour of Hastings and the Grand Army in 1823, and Wellington and Arbuthnot were appointed by a royal warrant. Alfred Kinloch, *Abridgment of the Report of the Proceedings in the Case of the Deccan Prize Money, with Supplementary Papers, etc.* (London, 1864).

<sup>81</sup> BL, IOR L/L Box 54 (386), Edward Lawford to James C. Melville, 10 Aug. 1830.

<sup>82</sup> 2 State Trials, 450–8.

<sup>83</sup> Cf. Peers, *Mars and Mammon*, 24–5, 48.

<sup>84</sup> TNA TS 11/122, John Kirkland to G. Maule, 10 July 1831.

<sup>85</sup> Howell, *Judicial committees*, 8.



‘despotic violence’.<sup>86</sup> It was alleged that Joseph Hume ordered Bedreechund and Anoopchund to write a petition in order to use it in the Commons debate.<sup>87</sup> Furthermore, the radicals used the case for demanding reform of the Privy Council, which had been urged by Henry Brougham,<sup>88</sup> by emphasising Narroba’s personal calamities in parliament.<sup>89</sup> The linkage strategy with the Deccan Prize Money case might be proposed by the radicals, who had used it to criticise the government before.<sup>90</sup> In this way, the Bedreechund case was used to vindicate judicial reforms both at home and in the colony. This did not necessarily mean that the Bombay merchants identified themselves with the causes of radicals, but it certainly meant that the Bombay merchants had a specific interest in radicalism in Britain, as it could increase their means to challenge the government.

## VI. Conclusion

This chapter has pointed out that the Indian merchants’ demand for compensation for damages incurred in times of war resulted in the general debate on the character of British governance in India. In the midst of the crisis in the 1820s, the government’s militarist logic of emergency was

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<sup>86</sup> *Oriental Herald*, 14 (1827), 7–11.

<sup>87</sup> BL, IOR L/L Box 54 (386), E. Lawford to J. C. Melvill, private and confidential, 19 Jan. 1831.

<sup>88</sup> Parl. Debs. (series 2) vol. 18, col. 127–258 (7 Feb. 1828). Between 1815 and 1826, The appeals committee of the Privy Council sat on average 10 days a year and dealt with 496 cases of appeal from the colonies, including 54 cases from India. Among them, 319 cases were disposed of and 177 were in arrears, and only 11 out of 54 cases from India were dealt with. *Asiatic Journal*, 24 (1827), 148. See also Howell, *The judicial committee*, 16–7.

<sup>89</sup> Parl. Debs. (series 3) vol. 14, cols 1136–56 (6 Aug. 1832); Parl. Debs. (series 3) vol. 14, cols 1322–5 (10 Aug. 1832).

<sup>90</sup> Parl. Debs. (series 2) vol. 13, col. 1408 (28 June 1825); Parl. Debs. (series 2) vol. 13, cols 1466–72 (1 July 1825).

challenged by the judges' civilian logic of law. Officials feared that the King's Court's rulings, accompanied with its claim of sovereign status, would hinder the government's conduct of war in the future and disturb the tranquillity of the newly conquered territories. In the end, the government's insistence of state necessity was sanctioned in the appeal cases, and the judges' alternative vision of colonial governance was rejected. This fact was important for later developments of colonial jurisprudence in the nineteenth century because the reformed Judicial Committee of the Privy Council since 1833 strictly followed the principle of *stare decisis* across the empire. That is, the decision in these cases must be followed by all local courts in the colonies.<sup>91</sup> Precedent made in the cases of *Bedreechund* were indexed and promulgated in the form of law reports across the empire.<sup>92</sup> The Judicial Committee followed the decision, for example, in the case of *Marais* (1901) from the Cape Colony in the Boar War, endorsing the inferior court's decision that the arrest under a martial law was not cognizable by a civil court and provoking the criticism of liberals.<sup>93</sup>

The cases examined in this chapter highlighted the pattern which strengthened the government's despotism. The Bombay merchants actively relied on the imperial network of lawyers and radicals. Those lawyers who had an anti-establishment inclination such as Attorney Ayrton or Barrister Morley were essential as the source of legal knowledge and techniques and as agents inside and outside the court. Radical MPs such as Hume, Buckingham and Forbes and reformist lawyers such as Denman enabled them to access metropolitan journalists, lawyers and politicians and provided them the

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<sup>91</sup> Bonny Ibhawoh, *Imperial justice: Africans in empire's court* (Oxford, 2013), 5.

<sup>92</sup> 1 Knapp, 423–4.

<sup>93</sup> *The Times*, 19 Dec. 1901; William Searle Holdsworth, *Essays in law and history*, ed. A. L. Goodhart and H. G. Hansbury (Union, New Jersey, 1995), 16.

language of corruption and reform to criticise the government. This Indian agency inevitably hardened the attitude of the government. This pattern—the Indian agency and the King’s Court’s collaboration led to the reactions of the government—accumulated the examples in which the rule of law was denied and the logic of emergency was sanctioned even in times of peace. This was the mechanism through which the Company’s garrison-state ideology was promulgated.

Put another way, the cases examined in this chapter show that the government’s perspective of the Indian government was derived by the emergencies in the mofussil, while that of the King’s Court was based on the civilian rule of law in the presidency town. While the government wanted to cut off the presidency town from the mofussil and applied different logics to them, the King’s judges insisted that the civilian rule of law should be expanded to the mofussil. These contrasting visions of the government were directly and most harshly contested over the King’s Court’s interference in the government’s mofussil governance, which is the theme of the following chapters.

## Chapter 3: Summons, writ, and revenue defaulters

### I. Introduction

The Bombay government officials were concerned about the effects of British legal institutions on the traditional social order. They thought that British law was essentially repugnant to the feeling of the Indians and disturbed tranquillity in the mofussil. Thus Elphinstone ordered in his circular in 1819 that the panchayat should be the principal instrument of civil justice,

but it must be exempt from all new forms of interference and regulation on our part. Such forms would throw over this institution that mystery which enables litigious people to employ courts of justice as engines of intimidation against their neighbours, and which renders necessary a class of lawyers, who amongst the natives are the great fomenters of disputes.<sup>1</sup>

Economic historians have not paid enough attention to the reasons of this antipathy towards the introduction of the British court. This is because they are more interested in the socio-economic levelling effects of the Company's Court on Indian rural society than its political consequences. As a result, the court is often seen as a transparent device through which the agrarian relationship was mechanically determined.<sup>2</sup> Instead, we need to pay more attention to the ideas and agency of those who used the court and those who constituted it. In other words, we need to examine the conditions and contexts

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<sup>1</sup> BL, IOR P/398/71, BJC 22 Mar. 1820, 1520, Circular, 18 Dec. 1819. This passage was later adopted in his report. Mountstuart Elphinstone, *Report on the territories conquered from the Paishwa submitted to the Supreme Government of British India* (Calcutta, 1821), 99–100.

<sup>2</sup> Ravinder Kumar, *Western India in the nineteenth century: A study in the social history of Maharashtra* (London, 1968), 153–7.

under which the levelling effects of the court were promoted or restrained by the colonial government.

David Washbrook's discussion on the Company's Court and agrarian relationship is suggestive in this respect. He argues that the court of law in India in the early nineteenth century was essentially a political rather than a legal institution:

The practice of the Anglo-Indian law cannot be divorced from the political structure of the colonial state. It never achieved autonomy from 'the executive'. ... Its concern with 'traditional' social norms, while no doubt reflecting a genuine desire to avoid social disturbance, also aided the collection of debt, which was of more than passing importance to an essentially extractive state.<sup>3</sup>

This passage captures the government's political perspective on the Company's Court. As Washbrook points out, the economic activities in India revolved around the Company's business of government, and the Company's Court was given a pivotal role in facilitating it. It was this political significance of the Company's Court that was at stake in the King's Court's interventions in the Company's local administration in the mofussil, which I examine in this chapter.

The conflict between the government and the King's Court in the mofussil is far less noticed than that between the government and the Company's Court. But, although the cases examined here were not as dramatic as those against the Company or its governors, nonetheless they posed serious problems for the government, especially for its collectors and judges in the mofussil. The King's Court's jurisdiction was limited to the presidency town

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<sup>3</sup> D. A. Washbrook, 'Law, state and agrarian society in colonial India', *Modern Asian Studies*, 15, 3 (1981), 669–70.

of Bombay. But the troubles were caused by the fact that the Indians living in the mofussil came to Bombay city to file suits in the King's Court. They did so because they could reap benefits from their jurisdictional jockeying between the King's Court and the Company's Court.

There were various practical obstacles posed by the King's Court's exercise of jurisdiction in the mofussil, which hindered the government's business. First the officials' regular duties were obstructed by the court's summonses of the government officials as witnesses of civil and criminal cases in the King's Court. Furthermore, the sheriff's execution of the writ sometimes caused commotions in the mofussil, which worried the Company's magistrates. They resisted it or refused to assist the bailiffs, but, in such cases, they were prosecuted in the King's Court for contempt of the court.

Another, far more serious problem of the King's Court was related to the government's revenue collection. The case in point was the use of the Kings' Court by revenue defaulters to overturn the decree of the Company's Court. In these cases, the revenue debtors 'colluded' with their friends and relatives in Bombay city and abused the writ process of the King's Court. The defendant solicited support for the government. Such acts of jurisdictional jockeying by the revenue debtors alarmed the Company's officials, who were always pressured to raise the amount of revenue by Bombay Castle and whose imperative was the maximisation of revenue. The regulations and the Company's Court were vital for the government's revenue administration in the mofussil. The collectors were given revenue jurisdiction and could directly attach the properties of revenue defaulters. More commonly, the collectors sued the defaulters in the Company's judiciary. This placed the collector under the same footing as a private party, and enabled him to collect the interest as well as the principal of the debt in the same way as in an

ordinary civil suit.<sup>4</sup> The overturning of the decree of the Company's Court curtailed the efficiency of debt recovery.

But the problem was not limited to the practical obstacles to revenue business. The political authority of the Company's revenue administration was at stake. As Ballhatchet suggests, the regulations and the Company's Court were vitally important for upholding the legitimacy of the collector's discretionary measures of revenue collection. He quotes Elphinstone's comment: 'The most extensive exercise of discretion passes unquestioned if authorised by a statute and exerted in a specific form; but the smallest act of authority becomes suspected if there is anything informal in the proceedings'.<sup>5</sup> Ultimately, the collection of revenue was the right of the sovereign. In pre-colonial western India, its control was the practical expression of Maratha sovereignty, and the denial of its payment was the expression of sedition and rebellion.<sup>6</sup> The British followed suit after the conquest. Elphinstone declared the establishment of the British rule in the Deccan by issuing a proclamation in 1818 which prohibited all persons from 'paying revenue to Bajee Row or his adherents'.<sup>7</sup> The British collectors were the representative of British sovereignty. The King's Court's exercise of the jurisdiction in the mofussil was tantamount to the denial of the Company's revenue sovereignty. Because of this, the jurisdictional problem of the King's Court posed a new, general threat to the Company's governance in the

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<sup>4</sup> BL, IOR P/400/48, BJC 24 Aug. 1831, no. 67, J. A. Dunlop to Gov., 15 Aug. 1831.

<sup>5</sup> Ballhatchet, *Social policy*, 246, BL, IOR P/386/18, BPC 31 Jan. 1827, no. 51, M. Elphinstone, minute, 4 Jan. 1827.

<sup>6</sup> André Wink, *Land and sovereignty in India: Agrarian society and politics in eighteenth-century Maratha Svarajya* (Cambridge, 1986), chapter 3.

<sup>7</sup> *Poona Affairs: Elphinstone's embassy Part 2 1816–1818*. ed. G. S. Sardesai (Poona Residency correspondence, xiii, 1953), 302, the Satara proclamation on 11 February 1818.

mofussil.

## II. Popularity of the Company's Court

The context of the King's Court's increasing interference in the mofussil was the Company's Court's popularity among the Indians. When the Konkan and Gujarat were ceded to the British in 1817, the Indians in the provinces rushed to the newly established British courts of law. Local creditors such as native bankers, merchants and moneylenders used the more regular process of the *adalat* to sue their debtors living in villages, hills and mountains.<sup>8</sup> According to Chaplin, the numbers of cases instituted in the Deccan for the years 1819/20, 1820/21, and 1821/22 were 6,522, 6,370 and 9,660 respectively.<sup>9</sup> The number increased significantly in the late 1820s. The following table shows the number of original suits in civil cases for 1825–8.<sup>10</sup>

	<u>1825</u>	<u>1826</u>	<u>1827</u>	<u>1828</u>	<u>1829 (first half)</u>
<u>Deccan</u>					
Instituted	12,405	15,173	24,969	25,041	6,092
Decided	13,403	14,779	24,465	25,488	7,344
Depending	2,991	3,383	3,886	3,439	2,187
<u>Old Provinces</u>					
Instituted	25,586	24,300	32,178	60,945	10,188
Decided	23,326	26,376	28,811	64,460	11,125
Depending	5,608	3,532	7,878	4,357	2,380

<sup>8</sup> *Thana gazetteer*, i. 306–10.

<sup>9</sup> William Chaplin, *A report exhibiting a view of the fiscal and judicial system of administration introduced into the conquered territory above the Ghauts under the authority of the Commissioner in the Dekhan* (Bombay, 1824), 107–29.

<sup>10</sup> PP 1831–32 (735-IV), Appendix, 226, CoD to Gov., 15 Feb. 1832. The fluctuation of number in 1828 was due to the abolition and resumption of stamp duty. *Ibid.*, 227.



There were on average 955 appeal cases per annum in the Old Provinces and 615 in the Deccan between 1825 and 1828.<sup>11</sup>

The majority of the suits were instituted by Indians. The statistics show that in the first half of 1827 and 1828 the numbers of suits instituted by Europeans were 2,762 and 3,249 while those by Indians were 19,787 and 52,752.<sup>12</sup> Elphinstone noted that the major subjects of litigation were boundary disputes, division of property on the separation of families, inheritance to land ('which is perhaps the greatest source of litigation throughout the whole country'), and debts to bankers.<sup>13</sup> St John Thackeray, the collector of Dharwar in the Southern Maratha Country, classified the suits in his district (see appendix 1). It shows a wide range of issues of conflict, including debts, share of family property, grain or cotton trade, sales of jewels, cloths or commodities, mortgages of watans and enams, marriages, adoptions, and caste disputes.<sup>14</sup>

A major reason of the popularity was the fact that the formal, egalitarian and mechanical working of the British courts enabled the creditors to recover debts more easily. The former mode of debt collection through the village panchayat was unfavourable for the moneylenders as the panchayat was often constituted by the village authorities inclined to protect the ryots in their villages.<sup>15</sup> The lack of local knowledge on the part of the British was another

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<sup>11</sup> PP 1831–32 (735-IV), Appendix, 230.

<sup>12</sup> Ibid.

<sup>13</sup> Mountstuart Elphinstone, *Report on the territories conquered from the Paishwa submitted to the Supreme Government of British India* (Calcutta, 1821), 88.

<sup>14</sup> East India Company, *Selection of papers from the records at the East-India House relating to the revenue, police, and civil and criminal justice, under the Company's governments in India* [hereafter SRJ], 4 vols. (London, 1820–26), iv. 839–41, St. J. Thackeray to W. Chaplin, 11 Aug 1822.

<sup>15</sup> Kumar, *Western India*, 153–7. R. De, 'South Asian legal traditions', in James D. Wright (ed.), *International Encyclopedia of the social and*

root cause of the increase of litigations. As Pamela Price points out, the Indians could easily manipulate the course and result of the trials since the British judges could not understand the details of local affairs.<sup>16</sup> Indeed, the Poona collector H. D. Robertson had to admit that sometimes the Indian litigants had a better knowledge about legal procedures than he did.<sup>17</sup> The panchayat suffered from the same problem. Chaplin noted in his report in 1822 that ‘frivolous and groundless complaints’ were ‘mainly owing to our want of acquaintance with personal character, which leads to Panchaets being ill constituted. ... all who have bad causes prefer the Udalut [than *ghur sumjhoots* or private adjustments]’.<sup>18</sup>

Some socio-economic factors also promoted the use of the adalat in Bombay in the 1820s. The first was the agricultural depression. As Sumit Guha demonstrates, prices fell dramatically at the beginning of the British rule in the Deccan and did not recover until the 1850s.<sup>19</sup> Chaplin analysed that the low price of grain was partly caused by the diminution of demand due to the ‘annihilation of Paishwa’s court and army’, the disappearance of the British military establishment, the commercial interruption before and during the war, the emigration of many families following Baji Rao to Bithoor and Benares, and the diminution of the amount of currency withdrawn or hidden by the peshwa. The fall of prices furnished ‘a plausible subject of complaint to the Ryut’.<sup>20</sup> Collector Thackeray remarked that the scarcity of grain increased

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*behavioural science*, 2nd edition, volume 23 (Amsterdam, 2015), 58–62.

<sup>16</sup> Price, “Popularity” of the imperial courts’.

<sup>17</sup> See H. D. Robertson’s comment on a case in which a collector was sued by a kulkarni in Sholapur. MSA, Judicial Department [hereafter JD], 1827, 8/134, 19–56.

<sup>18</sup> Chaplin, *Report*, 125.

<sup>19</sup> Sumit Guha, *The agrarian economy of the Bombay Deccan 1818–1941* (Delhi, 1985), 17–24.

<sup>20</sup> Chaplin, *Report*, 99–102

the grain trade and the suits relating to it.<sup>21</sup>

Second, the ryots in the mofussil were deeply embedded in the chain of public and private debts. Elphinstone commented that in the Deccan, the whole of the agricultural population was plunged in debt.<sup>22</sup> Chaplin likewise reported that the ryots were ‘much in debt to Sahookars and Merchants, owing to the oppressions of the Revenue Contractors’, and their condition was like ‘the hellish torments of Sisyphus’ who sometimes mortgaged their miras fields as security for these debts.<sup>23</sup> The creditors included almost all the savers of money, such as higher government servants, pleaders, merchants, brokers, owners of trading boats, or better classes of landholders.<sup>24</sup> The Bombay government reported to the Court of Directors that the illiterate ryots of the Konkan were at the mercy of the Khot creditors.<sup>25</sup>

Accordingly, debt recovery was one of the major uses of the Company’s Court. Thackeray’s statistics showed that about 40 percent of suits in Dharwar were related to either ‘deposits, advances, assignments, interest and other money transactions’ or ‘bond debts’. The background was that, in many parts of the Deccan, the ryots paid the whole of their rents through the savakars (moneylenders) by giving up the entire corps to them. The savakars charged interest for all the advances, which reduced the ryots to ‘the condition of a menial slave’. District and village officials were also indebted to the savakars as they mortgaged their enam lands and became unable to pay the quit rents, resulting in the sequestration of the lands. The amount of debts increased rapidly as the savakar closed the account periodically, added interest to the

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<sup>21</sup> SRJ, iv. 839–41, St. J. Thackeray to W. Chaplin, 11 Aug 1822.

<sup>22</sup> Elphinstone, *Report*, 9.

<sup>23</sup> Chaplin, *Report*, 174–5.

<sup>24</sup> Meera Singh, *British revenue and judicial policies in India: A case study of Deccan 1818–1826* (New Delhi, 1994), 80–3.

<sup>25</sup> SRJ, iii. 784, Gov. to CoD, 23 Feb. 1822.

principal, and took a new bond.<sup>26</sup> The savkars' exploitation by means of the adalat was much resented in later years. A petition signed by 7,215 ryots in 1840 lamented, for example, that they were unwillingly dragged into the court of law, extorted money by the vakeels, deprived of their land based on unfamiliar regulations, and forced to appeal.<sup>27</sup>

In addition to personal debt, the problem of village debts was a major concern of the district officials. Elphinstone explained that in cases of unusual expenses such as employing sebundies for defence or 'paying an enemy or an insurgent for forbearance', the village could not pay them at once and contracted a public debt which was paid by annual assessments or by mortgages or grands of land.<sup>28</sup> Chaplin reported that '[a]lmost every village throughout the Mahratta country is involved in debts', which were commonly arisen from the exactions of the Maratha government. The village headmen contracted the advance of taccavi loan for the purchase of the seed, grain and cattle and, before the instalment of their first revenue, also contracted loans with the savakars who paid the revenue to the government. The savakars were also called for to pay many forced contributions (puttees). The extent of debts was difficult to estimate but 'would probably be found to exceed the means of the country to discharge them'. As the government banned the charge of extra assessment for repaying them and the private use of coercion (tuggaza), the only means to recover these debts was the Company's Court.<sup>29</sup> The collectors

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<sup>26</sup> R. D. Choksey, *The aftermath (1818–1826)* (Bombay, 1950), 201–3, W. Chaplin to Gov., 5 Jan. 1820. For an explanation of this in later year (1851), see *Thana gazetteer*, i. 309–10.

<sup>27</sup> Kumar, *Western India*, 154.

<sup>28</sup> Elphinstone, *Report*, 26.

<sup>29</sup> Choksey, *Aftermath*, 193–5, 197–200, W. Chaplin to Gov., 5 Jan. 1820. See also *Early British administration, 1817–1836: Deccan Commissioner's files and pre-mutiny records on Gujarat*, ed. R.D. Choksey (Poona 1964), 68–9, J. Briggs to W. Chaplin, 5 July 1822.

could not decide whether a claim was *bona fide* or not, because the sum was great and the creditors so numerous.<sup>30</sup> Collector Briggs of Khandesh reported that the villages of Nimboree and Kirdee borrowed Rs 16,000 and Rs 1,235 respectively for meeting the demands of the Pindaris with yearly rates of 100 to 120 percent.<sup>31</sup> The panchayat was expected to settle such disputes, but appeals against its awards were common.<sup>32</sup> These factors promoted the popularity of the Company's Court. I now turn to the accompanying rise of the use of the King's Court, and the government officials' difficulty in dealing with it.

### III. Summons of government officers

The King's Court's exercise of jurisdiction in the mofussil was problematic in many ways. First, it obstructed the ordinary business of revenue and judicial administration. Particularly problematic were the summonses issued to the government officials in the mofussil as witnesses and jurors. Attending to summonses was costly and time-consuming. The judges summoned to a criminal case were demanded to produce documents in their courts only in a week or so. The magistrates (that is, collectors) and their assistants were ordered to make a testimony about the situation in which they committed European criminals. Non-attendance was fined (often Rs 1,000). The officials had to obtain permission from the government, as they were prohibited to leave their station without one.<sup>33</sup> Indian officers such as the mufti (Islamic

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<sup>30</sup> Chaplin, *Report*, 178–9.

<sup>31</sup> Avind M. Deshpande, *John Briggs in Maharashtra: A study of district administration under early British rule* (Delhi, 1987), 143.

<sup>32</sup> Singh, *British revenue and judicial policies*, 83.

<sup>33</sup> MSA, JD, 1821–23, 37/45, 1–10, Northern Konkan judge to Gov., 3 July 1821; MSA, JD, 1826, 25/126, 275–82, Northern Konkan judge to Gov. 18 Fe.

law scholar) were also summoned to the court as witnesses.<sup>34</sup> The officials complained about the summonses and requested government to send representation to the court.<sup>35</sup> The court could also issue commissions to the officials in the mofussil to act for the business of the court. For example, the judges of sadr foudari adalat were issued commissions to take evidence in a case pending in the court in 1823. The governor had to request the court not to do so.<sup>36</sup>

Sometimes the summonses might completely stop the local administration. In January 1824, E. H. Baillie, the judge in the Northern Konkan, was summoned to the Supreme Court. On this occasion, Saville Marriott, the Northern Konkan collector, and Thomas Charles Fraser, the collector of sea customs in the Konkan, were also summoned to the court. This meant that all the government's high officials would be absent from the Northern Konkan. The government pointed out that their attendance in these trials appeared unnecessary. The Supreme Court was asked to make an application to the government before summoning public officers.<sup>37</sup>

Officials in Bombay city were troubled by summonses to the grand and petty juries. Since the King's Court was the court of oyer and terminer and gaol delivery, the sheriff of Bombay could summon the inhabitants of Bombay city as grand jurors.<sup>38</sup> The duty of jury was disliked by the British. Richard

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1826. In the 1820s, it took 2 days from Thana, Northern Konkan, to Bombay, 10 days from Poona, Deccan, 20–21 days from Surat, Gujarat, and 38 days from Dharwar, Southern Konkan. The journey cost Rs 10 a day. *Bombay Almanac and Calendar* (Bombay, 1828), Appendix, 47–52.

<sup>34</sup> MSA, JD, 1821, 18B/21, 109–16, Assistant judge to Gov., 14 Mar. 1821.

<sup>35</sup> BL, IOR P/399/27, BJC 22 Oct. 1823, 4443, W. Chaplin to Gov., 7 Sep. 1823.

<sup>36</sup> BL, IOR P/399/25, BJC 8 July 1823, 3046, Sadr adalat to Gov., 6 June 1823.

<sup>37</sup> MSA, JD, 1824, 18/79, 33–44.

<sup>38</sup> Morley, *Digest*, ii. 667, Bombay Supreme Court Charter, XLIV.

Thomas Goodwin, a member of the council, even suggested allowing summary convictions of felonies because, if they were all sent to the jury trial in the Supreme Court, ‘the juries must be assembled from day to day to the intolerable and ruinous inconvenience of individuals from month’s end to month’s end, such an encroachment on the pursuits of industrious shopmen and others would be a public misfortune’.<sup>39</sup>

Officials’ summonses to the jury hindered the routines of the business of government. In 1826, for example, William Newnham, the chief secretary, reported that he and the secretaries of the revenue and the judicial departments (i.e. all the secretaries of the Bombay government) received summonses to attend the grand jury. He said that if one or all of them were to attend to the court, it could cause an entire interruption of the duties of their departments during the days in which the grand jury would sit.<sup>40</sup> Newnham detailed the inconvenience as follows. During three and half days in which he attended the grand jury, the whole business of the political and military departments had been stopped. When he came back to his office, he found ‘fifty nine public letters lying unopened on his table besides numerous private references on official subjects’. He added that some important despatches would not have been sent if the grand jury was not suspended in the second day to enable him to attend the council meeting and to send them.<sup>41</sup> Sometimes the principal and deputy in a same department were summoned in

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<sup>39</sup> BL, IOR F/4/1336/52921, 355–7, BGC 4 Jan. 1826, no. 16, R. T. Goodwin, minute, 23 Dec. 1825.

<sup>40</sup> MSA, General Department [hereafter GD], 1826, 24/132, 7–8, BGC 29 Mar. 1826, Chief Sectary’s memorandum, 25 Jan. 1826. The government officials at Calcutta and Madras also complained about the service in the grand jury. Ibid., 9–16.

<sup>41</sup> Ibid., 21–3, William Newnham to Gov., 28 Apr. 1826. For importance of secretaries, see Peers, *Mars and Mammon*, 35–6.

the same sessions, provoking resentment.<sup>42</sup>

Similarly, the *sadr adalat* judges, after their seats were moved from Surat to Bombay, complained their summons to the grand jury. In 1829, for example, the chief justice and an acting puisne judge were summoned to the grand jury. They said that they should be exempted from it as in Calcutta and Madras.<sup>43</sup> A week later, the judges further complained that the *sadr adalat* had to be adjourned as the register was summoned to the grand jury. They begged the government to obtain exemption of the register as well.<sup>44</sup> In another example, the Persian Secretary, who was in charge of the government's correspondence with the Indian princes and the sardars, was summoned to the grand jury at the same time as his writer was summoned to the petit jury. This caused delay in their business.<sup>45</sup> The attendance to the juries was mandatory, and if they ignored it, they were to be fined or imprisoned for the contempt of the court.<sup>46</sup> In this way, the government officials were dragged into the business of the King's Court, and they resented that the efficiency of the local administration was hindered.

In addition to these practical obstacles, the officers thought that the summonses sometimes injured the government's respectability and political authority. When Francis Warden, a member of the council, was summoned, his testimony was heard in the witness box. This was contrary to the convention that the members of the council were invited to the bench to speak to the court. Humiliated, Warden complained to the governor and even sent his

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<sup>42</sup> BL, IOR P/346/24, BGC 25 Jan. 1826, no. 18, Gov. to SC, 20 Jan 1826.

<sup>43</sup> MSA, GD, 1829, 19/196, 333–6, *Sadr adalat* to Gov., 12 June 1829.

<sup>44</sup> *Ibid.*, 347–8, *Sadr adalat* to Gov., 19 June 1829.

<sup>45</sup> MSA, GD, 1830–1, 26/245, 237a–b, Persian Secretary to Gov., 10 Mar. 1831.

<sup>46</sup> Morley, *Digest*, ii. 666, SC Charter XLIII,.



remonstrance to the Court of Directors.<sup>47</sup> The chief justice claimed that Warden did not have any positive right to be heard in the bar. The President of the Board of Control, though admitting that he did not have such positive right, stated that it had been conventional to show such courtesy to officers of high rank both in Britain and in India, and it was materially important in India where ceremonial demonstration of authority was important for the stability of the rule.<sup>48</sup> Thomas Munro, the governor of Madras, heard of the event from Elphinstone and commented that the judge was in a state of 'legal madness'.<sup>49</sup> In 1827, Elphinstone wished the Board of Control to exempt the governor and the members of the council from the summonses to the grand jury.<sup>50</sup> But the trouble of summonses continued throughout the 1820s, and the government officers frequently complained about them.

#### IV. Writ and disturbance in the mofussil

Besides the interruption of revenue and judicial routines, the government officials were concerned that the execution of the King's Court's writs by the sheriff and his officers would provoke disturbances in rural society. When a decree was issued in a civil case, the sheriff appointed bailiffs among his officers and sent them to the mofussil to execute the writ. As in England, they were vested with the discretionary power to resort to any means to execute it. For example, when they could not attach the property of the defendant, he could attach those of the debtors of the defendant. It was mandatory for all British subjects to support it. The sheriff's officers usually went to the

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<sup>47</sup> Drewitt, *Memoirs of Edward West*, 223–5; BL, MSS Eur F88/399, 251–332.

<sup>48</sup> BL, IOR F/2/9, 24–32, C. Williams Wynn to E. West, 19 Jan. 1827.

<sup>49</sup> BL, MSS Eur F88/397, 26–7, Thomas Munro to M. Elphinstone, n.d.

<sup>50</sup> BL, IOR/F/2/9, 32–40, Williams-Wynn to CoD, 20 Jan. 1827.

Company's magistrates to request assistance to their execution. But sometimes the inhabitants in the mofussil resisted the attachment when, for example, they were a third part debtor, or when they simply doubted the validity of the writ. For example, in 1823 in Rajapur, the Southern Konkan, the execution of writ was violently disrupted by over 200 Brahmans and Bhatias with the support of the local kamavisdar.<sup>51</sup> From the fear of such violent incidents, sometimes the government's officers refused to assist the execution and provoked the judges' criticism.

The issue was first disputed in the case of one Balla Gunness Sette in 1817. He was a vakeel of the Company's Court at Thana investigating embezzlement cases in the collector's office. He succeeded in revealing the corruption of Indian servants, but one of them named Govind Abbajee conspired with Balla Gunness's creditor and filed a suit in the Recorder's Court.<sup>52</sup> The sheriff's officers came to Thana to execute the writ, but the judge and magistrate of the Company, Stephen Babington, resisted it, thinking that he was outside the jurisdiction of the King's Court.<sup>53</sup> The government supported Balla Gunness, but Recorder Alexander Anstruther judged against him.<sup>54</sup> Macklin reported that in the court the recorder said that he would not listen to such a doubt on the jurisdiction and that, if further resistance was made by Babington, he should be taken into custody.<sup>55</sup>

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<sup>51</sup> BL, IOR P/399/25, BJC 16 July 1823, 3064, W. A. Morgan to Gov., 30 June 1823.

<sup>52</sup> BL, IOR P/398/44, BJC 18 June 1817, 2262–368, Stephen Babington to Gov., 6 June 1817.

<sup>53</sup> BL, IOR, P/398/48, BJC 5 Nov. 1817, 4165–81, S. Babington to Gov., 28 Oct. 1817.

<sup>54</sup> Harry Borradaile, *Reports of civil cases adjudged by the court of Sudder Adawlut for the presidency of Bombay, between the years A.D. 1800 and A.D. 1824*, 2 vols. (Bombay, 1825), i. 364–77. See also Morley, *Digest*, ii. 'Jurisdiction', paras 61–2, 74–7.

<sup>55</sup> BL, IOR F/4/699/18968, H. G. Macklin to Gov., 7 Nov. 1817, 31 Dec. 1817

There were several elements which made the officials critical of the sheriff's execution. The conspiracy between the plaintiff and the defendant was the one, as indicated in the above case. Another was that the sheriff often skipped proper procedures of debt recovery through the court, directly collected money from the third party debtors and distributed it to the creditors. This was resented by the Company's Advocate General as 'a most illegal practice' prevalent in the mofussil.<sup>56</sup> The officers also apprehended the lack of legal protection when they assisted the execution. Unlike the sheriff, they were not protected by the indemnity bond and might incur personal losses if the process was wrong. Some of the officers refused assistance for this reason.<sup>57</sup> Another problem was false writs. It was easy to pretend to be the bailiffs. In 1823, Southern Konkan Magistrate J. A. Dunlop reported that no inhabitants in the district could judge whether the Recorder's Court's papers were genuine or not because they could not read them when written in English. He suggested that it was desirable to devise some measures by which the local Indian officers could check the validity of the writ to reduce the size of the abuse.<sup>58</sup>

The problem of the sheriff's writ manifested itself in 1820, when H. D. Robertson, the collector, magistrate and judge of Poona, refused to assist the sheriff's officers and arrested them for disturbing the tranquillity of the locality. Robertson was prosecuted by the sheriff in the Recorder's Court and judged guilty for the contempt of court. The case was a sensation for the

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and 12 Mar. 1818.

<sup>56</sup> BL, IOR P/346/26, BGC 19 Apr. 1826, no. 68, G. Norton to Gov., 17 Apr. 1826.

<sup>57</sup> BL, IOR P/399/37, BJC 25 Aug. 1824, 4935–9, V. Hale, Southern Konkan judge, to Gov., 22 June 1824; BL, IOR P/399/37, BJC 15 Sep. 1824, 5264–7, V. Hale to Gov., 1 Sep. 1824; BL, IOR P/399/38, BJC 29 Sep. 1824, 5554–5, E. Grant, Surat criminal judge, to Gov., 10 Sep. 1824.

<sup>58</sup> MSA, JD, 1821–23, 37/45, 173–88, J. A. Dunlop to Gov., 11 Apr. 1823.

government.<sup>59</sup> The case was filed by a collision between the plaintiff and the defendant. The plaintiff was a Bombay merchant named Gungjee Purshotum, and the defendants were Poona merchants, Goculdass Natha and Wittul Hurka. The court judged in favour of the plaintiff and issued the writ of fieri facias. The sheriff's officers were sent to Poona to execute it. They broke into a house of one Bappoo Angull, an agent of Wittul, and seized his property in his house. There was a dispute between Goculdass and Bappoo over a property, and Goculdass colluded with Gungjee to take a property back from Bappoo. Bappoo and his associates resisted the seizure, saying that they would employ men and take it back by force. The bailiff replied that 'Here all you Bramins make gentlemen believe anything. But the case is very different in our Bombay'. Bappoo replied, 'What imprudent folks these Bombay people are'. Bappoo solicited support for Robertson. Robertson saw this conduct as an illegal trespass and seizure of property and arrested the sheriff's officers.<sup>60</sup>

This case highlighted the difference between the district officers and Bombay Castle. The government did not approve Robertson's conduct. He was told that the sheriff's writ ran throughout the presidency and that the only remedy for Bappoo was to prosecute the sheriff or his officers in the Recorder's Court. Robertson and his superior William Chaplin, the Deccan Commissioner, were instructed to release the sheriff's officers immediately.<sup>61</sup> Chaplin and Robertson did not accept it. Robertson justified his conduct by saying that 'the English law does not permit' to seizure someone's property without a decree, and the sheriff's officers were illegal as they broke into the

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<sup>59</sup> A special volume of 'the sheriff's writ' was compiled in the judicial department: MSA, JD, 1821–23, 44/53.

<sup>60</sup> BL, IOR P/398/75, BJC 20 Sep. 1820, 3788–813, enclosure no. 7, H. D. Robertson to W. Chaplin, 5 Sep. 1820; BL IOR/P/398/72, BJC 31 May 1820, 2652–5, H. D. Robertson to W. Chaplin, 13 May 1820. Emphases are original.

<sup>61</sup> BL, IOR P/398/72, BJC 10 May 1820, 1933–4, Board, minute, 9 May 1820.

house ‘*without legal authority*’.<sup>62</sup> Robertson and Chaplin’s opposition was based on a general concern that the King’s Court’s procedure was alien and harsh to the Indians. Chaplin strongly urged that some measure should be taken to ‘prevent the permanent establishment of the English Code with all its appurtenances, in a conquered territory, whose inhabitants, religion, laws, moral habits, customs and prejudices are totally repugnant to ... our British institutions’.<sup>63</sup> Robertson insisted that the Indians should not be subjected to ‘a power, the nature or extent of which had not been explained to them’. It was unjust because, while sheriff’s officers could seize anyone’s property, those who were seized of it could only obtain redress by going to Bombay and filing a ruinously expensive suit against the officers.<sup>64</sup>

In this case, then, the government endorsed the logic of law as opposed to the district officials’ political sense of crisis. The Company’s Solicitor, William Ashburner Morgan, pointed out that Robertson was personally liable to the Recorder’s Court’s attachment for impeding the sheriff’s execution, and he was also liable to a civil action for damages. Morgan stated that Bappoo should have resorted to the King’s Court for redress by suing the sheriff. The inconvenience of the suit in Bombay was ‘imaginary’: Bappoo only needed to write to some agent in Bombay to make the suit, or even coming to Bombay by himself was not a great hardship. He should not seek redress outside the court, and Robertson’s act was an ‘illegal interference’. The recorder William David Evans decided that Robertson was guilty for contempt and ordered him to pay Rs 387 as damages. Evans concluded that any magistrate would incur

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<sup>62</sup> BL IOR/P/398/72, BJC 31 May 1820, 2652–5, H. D. Robertson to W. Chaplin, 13 May 1820. Emphases are original.

<sup>63</sup> BL, IOR P/398/74, BJC 9 Aug 1820, 3221–3, W. Chaplin to Gov., 31 July 1820.

<sup>64</sup> BL, IOR P/398/75, BJC 20 Sep. 1820, 3788–813, H. D. Robertson to W. Chaplin, 5 Sep. 1820.

the penalty if he would take the similar conduct.<sup>65</sup>

The contrast between the Bombay government and its district officials was also marked in another case in 1826, which shows that the government was rather concerned about the discretionary intervention of the district officers which could impair the regular working of the judicial system. In 1826, R. K. Arbuthnot, the first assistant of the Poona Collector and Magistrate, refused to assist the sheriff's officers, when a property of a Gosain, a third party debtor, was seized by the collusion of the parties. He thought that it was 'the breach of peace' and recommended the government to notify the sheriff that, if he continued to give such orders 'by which serious disturbances and impositions are likely to happen', his officers would be treated like other offenders.<sup>66</sup> But the Bombay government and its law officers disliked the magistrate's summary intervention in the writ process of the King's Court.<sup>67</sup> In the end, Arbuthnot was told that resisting giving assistance to the sheriff's officers was 'the breach of peace'.<sup>68</sup>

In this way, the district officials and the government took two different approaches. The officials suggested that disciplinary control and discretionary intervention were necessary in order to maintain tranquillity of the mofussil. On the other hand, the government and its law officers saw the maintenance of regularity as more important and tried to retain the existing relationship with the King's Court as far as possible. But as we shall see, this cautious attitude of Bombay Castle gradually changed in the late 1820s. The district officials'

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<sup>65</sup> BL, IOR P/398/78, BJC 13 Dec. 1820, 5268, William Ashburner Morgan to Gov., 1 Dec. 1820.

<sup>66</sup> BL, IOR P/346/26, BGC 19 Apr. 1826, no. 72, R. K. Arbuthnot to W. Chaplin, 12 Apr. 1826.

<sup>67</sup> BL, IOR P/346/27, BGC 10 May 1826, no. 28, G. Norton to Gov., 26 Apr. 1826.

<sup>68</sup> BL, IOR P/346/27, BGC 10 May 1826, no. 31, circular, 6 May 1826.

sense of danger started to overweigh Bombay Castle's legalist perspective. As we shall see, accumulation of similar cases of jurisdictional conflict hardened the attitudes of Bombay Castle.

#### V. Revenue defaulters' jurisdictional jockeying

While the magistrates were concerned about the danger of commotion in the mofussil caused by the King's Court, the judges of the Company's Court were worried about a more abstract but equally urgent threat of the King's Court on their judicial authority. The problem originated in the Indians' jurisdictional jockeying: they used the King's Court to overturn the decree of the Company's Court. This was a favoured strategy of revenue defaulters to evade debt recovery, which ultimately changed the government's conciliatory attitude towards the King's Court.

First, the King's Court was used to overturn the decision of the panchayat, the traditional arbitration system in Maharashtra. It was regarded as the fit mode of justice in the newly acquired territories, and its use was actively promoted by the Bombay government.<sup>69</sup> In 1819, Frederick Ayrton, a Bombay attorney, sent several letters to the inhabitants in inam villages in the Southern Konkan, who were the parties to the cases already decided in the panchayat.<sup>70</sup> In one case, he sent a peon to demand the payment of debts. The government reprimanded Ayrton, whose acts were 'in defiance of the native civil authority'.<sup>71</sup>

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<sup>69</sup> James Jaffe, *Ironies of colonial governance: Law, custom and justice in colonial India* (Cambridge, 2015). cf. Brimnes, 'Beyond colonial law'.

<sup>70</sup> BL, IOR P/398/63, BJC 16 June 1819, 1525, J. W. Pelly to Gov., 14 Apr. 1819.

<sup>71</sup> Ibid., Gov. to F. Ayrton, 10 June 1819.

The judges of the Company's Court well recognised that Indians' jurisdictional jockeying was the cause of the problem. They were worried about the erosion of the government's authority. In June 1823, for example, E. H. Baillie, the Northern Konkan judge, reported that a property bought by a public auction of the zilla court was attached by the King's Court and sold to an inhabitant of Bombay. Baillie stated that this was harmful to the Company's judicial authority because it would give an impression that a decree of the zilla court was rendered useless without the consent of the government, and that even the property purchased through the *adalat* and guaranteed under deed by the zilla court was insecure. He emphasised that it was of 'great importance' that 'the natives should look up to and place the greatest confidence in their legally constituted courts of justice ... and to consider that their acts can alone be set aside by the Government, to whom an appeal is always open'.<sup>72</sup> Baillie pointed out that, if similar cases were allowed in the future, every property was to be placed out of the search of the zilla court, even if it was situated in the Company's territory, as its owner could do so by making himself amenable to the King's Court.<sup>73</sup>

This kind of jurisdictional jockeying was facilitated by several factors. First, it was encouraged by the tardiness of the process of the *adalat*. An official reported that a suitor in the King's Court had sufficient time to commence his action, receive judgement, obtain a writ of execution (*fieri facias*) and recover debts against the defendant before the Company's Court could execute its judgement.<sup>74</sup> Second, the use of the King's Court was

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<sup>72</sup> BL, IOR P/399/25, BJC 2 July 1823, 2982–5, E. H. Baillie to Gov., 13 June 1823.

<sup>73</sup> *Ibid.*

<sup>74</sup> MSA, JD, 1829, 21/193, 57–75, Alexander Bell, assistant judge of the Northern Konkan.



facilitated by the high cost of making a countersuit against the sheriff's officers. In 1825, John A. Dunlop, the collector of Ahmednagar, reported that a petitioner's property was sold on account of debts due by his brother through the partnership which had been dissolved for two years. Dunlop thought it unjust, but the petitioner was too poor to prosecute the bailiffs in the King's Court. He begged the government to pay its expense.<sup>75</sup> The third factor was the availability of the Bombay lawyers. The Indians were well informed of the pro-/anti-government inclinations of the attorneys. The famous/notorious attorneys of the 1820s who irritated the government included Frederick Ayrton, Thomas W. Browne, and William Fenwick. They were in charge of the majority of cases discussed in this chapter. On the other hand, some attorneys such as William A. Morgan and his brother Edward C. Morgan, the Company's Solicitors, were often solicited when the Indians made countersuits against the sheriff and his officers.

Against this backdrop, revenue defaulters' jurisdictional jockeying and abuse of the King's Court became a serious problem. As I noted at the beginning of this chapter, the collectors usually instituted a suit in the *adalat* against revenue debtors to recover debt with interest. But this process was accompanied by a disadvantage: it allowed the debtors to resort to the King's Court to overturn the decree of the Company's Court in the same way as in a civil case. Many examples of revenue debtors' evasion by means of the King's Court were recorded in the Company's revenue proceedings.

In one case in the Northern Konkan in 1825, a revenue defaulter called Shaik Ahmed Kubbe in Thana applied the collector to repair to another town in the Northern Konkan to apprehend his security, and on his way back to

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<sup>75</sup> BL, IOR P/399/49, BJC 12 Oct. 1825, no. 18, J. A. Dunlop to W. Chaplin, 26 Sep. 1825, enclosed in W. Chaplin to Gov., 28 Sep. 1825.

Thana, visited one Hassein in Bombay city. He stayed there for four days, was arrested upon a writ of the Supreme Court taken out against him by Hassein, and was lodged in the Bombay gaol. The collector was convinced of the collusion between Shaik and Hassein.<sup>76</sup> But the government could only blame the peon who took Shaik to Bombay.<sup>77</sup>

It is remarkable that how little the government could do to deal with this kind of evasion. In another case in the Northern Konkan, a revenue defaulter, one Khanoot Ravoot, was sued by a Bombay inhabitant. The judgement against him was obtained in 1822, but the property was not sold until 1824. The government suspected the delay, investigated the case, and found that the plaintiff was the son-in-law of Khanoot. By that time, the plaintiff died and the property was transferred to the administratrix, the daughter of Khanoot. Company's Solicitor W. A. Morgan commented that, even if the lapse of time was set aside, it seems hardly possible to succeed in making a legal action, as there was not sufficient evidence, and as the Company's Court had not taken any steps in its initial stage, which could have enforced its process. The government could not take any further measures.<sup>78</sup>

The authority of the government rather than the amount of lost revenue was the problem. In some cases, the government's judicial authority was openly denied by the defaulters. One Kassem Hoosseen Wohoray was involved in four cases of revenue arrears in the sadr diwani adalat as the security of the prosecuted. He was arrested under the Company's Court's decree in Bombay, but in the next day he was released from the gaol and taken

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<sup>76</sup> BL, IOR P/369/9, Bombay Revenue Consultations [hereafter BRC] 2 Nov. 1825, no. 58, J. B. Simson to Gov., 24 Oct. 1825.

<sup>77</sup> Ibid, no. 59, Gov. to J. B. Simson, 31 Oct. 1825.

<sup>78</sup> BL, IOR P/369/21, BRC 21 June 1826, nos. 59–61; BL, IOR P/369/29, BRC 6 Dec. 1826, nos. 1–8.

into custody by officers of the deputy sheriff. Kassem was guarded by armed men to resist further seizure by the adalat. The Northern Konkan collector criticised the sheriff and the deputy sheriff and insisted to make a suit against them.<sup>79</sup> The Northern Konkan judge expressed his concern that ‘if suffered to pass unnoticed and unpunished, it will be the means of lowering the court in the eyes of the natives, and bringing its authority in disrepute’.<sup>80</sup> The Advocate General agreed that it was ‘a flagrant contempt of the adawlut court’ which was caused by ‘a conspiracy among the friends of the prisoner to abuse the process of the Supreme Court by a sham suit’. But he added that their indictment was difficult as it was ‘almost impossible that such circumstances can be detected so clearly as to be brought home to the parties’.<sup>81</sup> These cases clearly show that the government could not take any effective measures against the revenue defaulters’ jurisdictional jockeying.

## VI. The Govind Abbajee case

As we have seen, while the district officials demanded strong measures regarding the revenue jurisdiction, the government preferred moderate responses and disliked an open collision with the Supreme Court. But the government had to change its attitude when the King’s Court’s interference resulted in denying the Company’s revenue and judicial authority *in toto*. By tracing jurisdictional manoeuvre of a revenue defaulter named Govind

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<sup>79</sup> BL, IOR P/400/2, BJC 24 Jan. 1827, no. 54, J. B. Simson, to Gov., 15 Jan. 1827; BL, IOR P/400/3, BJC 14 Feb. 1827, no. 29, Alexander Bell, Acting register of sadr adalat, to Gov., 16 Jan. 1827.

<sup>80</sup> BL, IOR P/400/3, BJC 28 Feb. 1827, no. 7, E. H. Baillie to Gov., 9 Feb. 1827.

<sup>81</sup> BL, IOR P/400/3, BJC 7 Mar. 1827, no. 23, G. Norton to Gov., 14 Feb. 1827.

Abbajee, one of the most notorious persons in the Northern Konkan during the 1820s, we can see the changing attitude of the government in the matter of King's Court's revenue interference.

Govind Abbajee, a Prabhu, was a former head clerk of the collector's office as translator and interpreter, who was said to have possessed 'an unlimited influence over the Collector'.<sup>82</sup> But in 1817, he was expelled from his office, convicted and punished for malversation.<sup>83</sup> Since then, the former revenue officer became the *bête noir* for the government officers in the Northern Konkan. Abbajee was skilled in his use of the King's Court. He was a hub of those who used/abused the court to evade the collection of revenue arrears. For example, he was acquainted with one of such revenue debtors, one Ramchunder Bawajee, who instituted a suit in the Recorder's Court to overturn the zilla court's sequestration of his property in the Northern Konkan in 1819.<sup>84</sup> By utilising his knowledge, experience, and network, Abbajee almost succeeded in outwitting the government.

Abbajee filed a plaint against the Northern Konkan Collector in the Supreme Court in 1826. He claimed that the produce in his grass land had been illegally restrained and sold by the collector at auction since the collector resumed the land in 1823.<sup>85</sup> The collector Simson pointed out that, first of all, the Supreme Court did not have jurisdiction over revenue affairs.

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<sup>82</sup> BL, IOR P/398/45, BJC 6 Aug. 1817, 2813–40, T. M. Keate, Salsette Judge and Magistrate, to Gov., 30 July 1817. The quotation is from BL, IOR P/400/16, BJC 26 Mar. 1828, no. 55, J. B. Simson to E. C. Morgan, 14 Mar. 1828.

<sup>83</sup> This caused the case of Balla Gunness Sette, which we saw above.

<sup>84</sup> BL, IOR P/398/63, BJC 28 July 1819, 1810, Stephen Babington to Gov., 19 July 1819; BL, IOR P/400/47, BJC 17 Aug. 1831, no. 7, L. R. Reid, Principal Collector in the Concan, to Gov., 9 July 1831.

<sup>85</sup> BL, IOR P/369/14, BRC 18 Jan. 1826, no. 28, Govind Abbajee to Gov., 9 Jan. 1826.

He vindicated his act by detailing Abbajee's fraudulent measures to take possession of the land. He explained that selling the crops at auction was a customary way to realise revenue.<sup>86</sup> The government approved this and ordered him to continue his measure.<sup>87</sup>

But the government soon changed its attitude and started to listen to the claim of Abbajee favourably. The focus of the discussion was whether it was lawful for the government to forcibly confiscate the crops of the lands before establishing its claim in the Company's Court.<sup>88</sup> Simson thought it was lawful. He said that it was admitted by the regulations and that it was the custom of the Northern Konkan to prohibit the crops from being removed from the village until the security was given.<sup>89</sup> He emphasised that the collector had the first right to decide on the matter of revenue, and the appeal should be made to the Company's Court, not to the Supreme Court.<sup>90</sup> The Advocate General agreed with his opinion.<sup>91</sup>

But the government denied the claim of the collector. The government's primary concern was the irregularity of the collector's confiscation, rather than the corruption of the native officer. The government's judicial secretary, Charles Norris, summarised the problem as follows. The Regulation related to this problem was Regulation I of 1823. Section 10 stipulated that anyone wholly or partially possessing the land exempted from assessment shall not be

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<sup>86</sup> BL, IOR P/369/14, BRC 25 Jan. 1826, no. 42, J. B. Simson to Gov., 15 Jan. 1826.

<sup>87</sup> BL, IOR P/369/15, BRC 15 Feb. 1826, no. 67, G. Norton to Gov., 30 Jan. 1826; Ibid., no. 68, Gov. to J. B. Simson, 10 Feb. 1826.

<sup>88</sup> BL, IOR P/400/2, BJC 24 Jan. 1827, no. 66, E. C. Morgan, Company's Solicitor, to Gov., 5 Jan. 1827.

<sup>89</sup> This practice was also revived in the Deccan in the 1820s. Guha, *Agrarian economy*, 26–7.

<sup>90</sup> BL, IOR P/400/2, BJC 24 Jan. 1827, no. 68, J. B. Simson to E. C. Morgan, 19 Dec. 1826.

<sup>91</sup> Ibid., no. 69, G. Norton to E. C. Morgan, 14 Jan. 1827.

deprived of it by the collector without judicial inquiry. The governor and the majority of the council were of opinion that the collector should first establish the possession of the land in the court before confiscating it, 'as the rules for resuming lands are so favourable to Government'. So Abbajee's crops should be restored, and the government should proceed against him in the Company's Court for holding the land exempt from assessment without any sufficient title.<sup>92</sup> Accordingly, Simson was instructed to replace the land to Abbajee and inform him that the value of it would be restored to him.<sup>93</sup>

The collector repeatedly emphasised the corruption of Abbajee and the bad effect of the jurisdictional encroachment of the Supreme Court in the revenue matter. Simson strongly reasserted his opinion, emphasising 'the fraudulent nature of the transaction and the established unprincipled character of Govind Abbajee'. Besides, he expressed his concern about how to realise the revenue of the year. He pointed out that the regulations were silent as to the rights vested in the collector to decree arrears. He was doubtful to what extent he was authorised to place the hay land under the attachment or to oblige the defendant to give security. He insisted on continuing the suit he had filed in the adalat because 'by withdrawing it, the Government will be subjected to heavy costs, and my proceedings will necessarily be looked upon as illegal and unsanctioned, a point of very considerable importance in Salsette, and to be carefully avoided if practicable'.<sup>94</sup> But the government did not listen to Simson's opinion. It only repeated to him that confiscating the rent-free land without judicial assessment was contrary to the regulations, the

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<sup>92</sup> Ibid., nos. 70, 76, Secretary, memorandum.

<sup>93</sup> Ibid., no. 77, Gov. to J. B. Simson, 23 Jan. 1827.

<sup>94</sup> BL, IOR P/400/11, BJC 21 Nov. 1827, nos. 41–2, J. B. Simson to Gov., 31 Oct. 1827; BL, IOR P/400/11, BJC 28 Nov. 1828, nos. 24–5, J. B. Simson to Gov., 19 Nov. 1827.

land should be restored to Abbajee and he should be compensated.<sup>95</sup> The next governor John Malcolm endorsed this decision.<sup>96</sup>

The above transaction underscores the difference between the collector's local, individual and discretionary approach and the government's universal, anonymous and systematic approach towards the revenue debtors. The collector's emphasis on the customary legitimacy of his attachment of crops and the bad character of Govind Abbajee indicates that he conceptualised the collection of revenue debt as a series of individual responses to particular arrears. On the other hand, the governors showed their inclination towards a universalism, in which individualised and localised response to particular cases were of little importance. A particular corruption of a native officer should be redressed within the established system of justice. The systematic and regular enforcement of the regulations was vital in this respect. Thus the collector's discretionary attachment which was not in accordance with the regulations was more harmful than good. In other words, the Bombay government conceptualised revenue business as an ordinary or civil matter, which should be regulated by the established system of law; the collectors, always under the pressure of revenue maximisation and the threat of revenue debtors' evasion, felt that they were always dealing with the emergency situation. As a corollary, this difference shows that the government and the district officers took different approaches to deal with the problem of 'native corruption'. They shared the idea of 'universal venality of Indians'.<sup>97</sup>

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<sup>95</sup> BL, IOR P/400/11, BJC 21 Nov. 1827, no. 43, Gov. to J. B. Simson, 12 Nov. 1827; *ibid.*, no. 25, Gov. to J. B. Simson, 27 Nov. 1827.

<sup>96</sup> BL, IOR P/400/15, BJC 12 Mar. 1828, no. 63, J. B. Simson to Gov., 30 Jan. 1828; *Ibid.*, no. 64, Gov. to J. B. Simson, 23 Jan. 1827; *Ibid.*, no. 65, John Malcolm, minute subscribed by Commander in Chief and R. T. Goodwin, n.d.; *Ibid.*, no. 69, Government Resolution, 12 Mar. 1828.

<sup>97</sup> Guha, *Agrarian economy*, 32–8.

But while the collectors attempted to deal with it with discretionary measures in each case, the government abandoned such an attempt and started to admit and incorporate the problem in an anonymous system of regulations.

The different priorities of collectors and governors also resulted in their different attitudes towards the King's Court's role in this affair. The collector emphasised the practical obstacles caused by the King's Court's intervention. Simson pointed out that his subordinate officers were repeatedly summoned to the court, and during that period, the business of the court was inevitably postponed:

[Suits] are wilfully or maliciously protracted; on the cases coming to a hearing, the defendants are spoken of no measured strains; the acts of the Government itself are equally liable to unpleasant reflections; and the publick officers attending as witnesses, or otherwise, may hear the acts of their superiors in office in all gradations characterised as violent, or unauthorised, or unjustifiable.<sup>98</sup>

For Governor Malcolm, though he was acquainted with all of these problems, this exposure by Simson missed the point. Malcolm articulated that, if the collector had followed the regulations, Govind Abbajee could not have incurred the damage he claimed, and even if he did, he could have been sued in the zilla court for his fraudulent acquisition of the title of land.<sup>99</sup> In other words, for the governor's, this was not the problem of jurisdictional conflict between the Company's and the King's Courts but that of the collector's irregular exercise of discretion. Thus, the government did not oppose the award given in Govind's favour by the prothonotary of the Supreme Court,

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<sup>98</sup> BL, IOR P/400/16, BJC 26 Mar. 1828, no. 54, J. B. Simson to Gov., 17 Mar. 1828.

<sup>99</sup> BL, IOR P/400/15, BJC 12 Mar. 1828, no. 65, J. Malcolm, minute subscribed by Commander in Chief and R. T. Goodwin, n.d.



who had been appointed the arbiter on 14 June 1828.<sup>100</sup>

However, the government's attitude dramatically changed in 1829, when Govind Abbajee attempted to rely on the Supreme Court to stop the enforcement of the zilla court's decree against him.<sup>101</sup> This time Governor Malcolm conceived that the Supreme Court's interference did disrupt the 'regularity' of the Company's revenue system, or in fact the whole edifice of the judicial system, and strongly reacted against the interference. His concern was detailed in the government's judicial letter to the Court of Directors. The outline of its argument is as follows.

Govind Abbajee threatened the judge of the Northern Konkan with an action in the Supreme Court not to sell the property under attachment, unless a bond of indemnification would be taken from the collector for the full value of the property. This was problematic because it meant that the Supreme Court could take cognizance of the judges of the Company's Court for their judgement. The direct consequence of this doctrine was that even the *sadr adalat* judge could be prosecuted civilly or criminally in the Supreme Court for their judgements and decrees. In consequence, the government's authority 'would be annihilated and the judicial and revenue administration of the country would become totally inefficacious. The only authority which would acquire power would be the Supreme Court'. If left unattended, the Supreme Court would be 'a Court of Revision and Appeal over the public servants in the interior'. It was the specific duty of the *sadr adalat*, which should never be

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<sup>100</sup> Rs 714 was awarded as damages with the costs, amounting to Rs 1,331. BL, IOR P/400/47, BJC 17 Aug. 1831, no. 7, L. R. Reid, Principal Collector of the Northern Concan, to Gov., 9 July 1831.

<sup>101</sup> The next collector made the suit against Govind Abbajee for false title in the zilla court, and in July 1828, the judgement was given against Govind, awarding Rs 17,000 for the government. His petition of appeal was rejected by the *sadr diwani adalat* because of the lapse of time. BL, IOR P/400/39, BJC 1 Sep. 1830, no. 14, Govind Abbajee to Gov., 22 Aug. 1830.

taken cognizance of by 'any other authority than the regular constituted court of regular superior jurisdiction'.<sup>102</sup>

The last phrase indicated the location of government's anxiety: the government feared that the Supreme Court's interference would annihilate the regularity of the *adalat* system, which was, according to an official's comment, 'a desirable check' on Indians' attempts to defraud the government or to withhold payments of arrear and what underpinned the efficiency of revenue collection.<sup>103</sup> This sense of danger on the system's regularity was the chief cause of Governor Malcolm's strong reaction against the Govind Abbajee case and, ultimately, what became a major driving force to subordinate the power of the King's Court under the local government.

Abbajee failed to make use of the Supreme Court.<sup>104</sup> He also failed to appeal to the *sadr adalat*.<sup>105</sup> But his failure did not originate in the exposure of his particular corruptions. It was because of the fact that his use of the King's Court threatened the authority and regular working of the Company's revenue and judicial system. The government's version of universal rule of law in the *mofussil* should not be demolished by the other version of the universal rule of the King's Court.

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<sup>102</sup> BL, IOR L/PJ/3/918, 137–45, Bombay Judicial Letter [hereafter BJJ], Gov. to CoD, 29 July 1829, A copy of this letter can be found in BL, IOR F/4/1339/53186. See also BL, IOR F/4/1339/53186, 53–5, Malcolm, minute, n.d.

<sup>103</sup> BL, IOR P/400/48, BJC 24 Aug. 1831, no. 67, J. A. Dunlop to Gov., 15 Aug. 1831.

<sup>104</sup> BL, IOR P/400/39, BJC 15 Sep. 1830, no. 16, L. R. Reid to Gov., 3 Sep. 1830.

<sup>105</sup> BL, IOR P/400/47, BJC 17 Aug. 1831, no. 7, L. R. Reid to Gov., 9 July 1831.

## VII. Conclusion

The King's Court's revenue intervention in the mofussil posed many problems to the government. The practical hindrance of the summons of the district officers as witnesses and Bombay officers as jurors was resented. The sheriff's officer's meddling with local inhabitants disturbed the tranquillity in the locality, and magistrates who resisted it were prosecuted in the King's Court. In the midst of declining revenue, the collectors were very sensitive to any kind of interference in the revenue business. The revenue debtors' abuse of the King's Court was the annoyance for them, but they did not have effective means to prevent it. The anxiety about the King's Court's revenue interference was a logical conclusion of the district officials' obsession with the revenue collection, which justified the use of discretionary power for debt recovery. In other words, these officials dealt with the revenue problems as emergencies. Threatened by material disturbances as well as legal conspiracies, they were always in a state of war.

At first, the district officials' sense of danger was not shared by the government and its law officers, who were more inclined to maintain regularity of the judicial system. In other words, the problem of revenue debt was not a political but a legal issue. The government shared its attitude with the Supreme Court. Both aimed at achieving the regular working of the judicial system, which was less reliant on discretionary interventions of officials in individual cases and more on the established and anonymous system of legal procedures. So they could be as conciliatory as possible in the matter of revenue jurisdiction. But, ultimately, the government had to abandon its conciliatory attitude. When the use of the King's Court totally denied the revenue and judicial system in the mofussil, the government conceived the

problem in the light of politics and emergency. The government's attitude was hardened by the accumulation of the use and abuse of the King's Court.

There was another, far more directly political issue in Bombay in the 1820s: the King's Court's intervention in the sardars. These native aristocrats were armed local magnates, whose cooperation and submission were essential for the government to keep the tranquillity of the country. There was no room for conciliation for the government on this matter. From the onset, the government as well as the district officials openly criticised the King's Court, which ultimately led to the total revision of their relationship. We shall see it in the following chapters.

Appendix 1: Suits in the Dharwar adalat, Southern Maratha Country  
1819–22<sup>106</sup>

	<u>1819/20</u>	<u>1820/21</u>	<u>1821/22</u>
<u>Total</u> 1166	281	387	498
judged by collector	2	9	32
amildars	0	131	63
panchayat	279	247	403
deposits, advances, assignments, interest and other money transactions	99	124	125
bond debts	32	23	68
shares of family property	30	33	37
grain	8	23	22
cotton, betel-nut and spices	1	4	8
watans	41	50	57
shops, stalls and houses	14	8	33
jewels and similar ornaments	16	15	31
cloths	0	3	7
caste/appeals against sentences of expulsion	11	9	14
marriages	3	15	7
claims of relations or subsistence from elder brothers and heads of families	5	17	13
pledged property except watans	0	5	12
mortgaged watans and enams	8	2	5
furniture, utensils and implements of trade and husbandry	17	18	26
cattle	3	20	18
adoptions	2	4	6
rent of land (between enamdars and ryots)	7	13	14

<sup>106</sup> SRJ, iv. 839–41, St. J. Thackeray to W. Chaplin, 11 Aug 1822.

## Chapter 4: Law, raids, and shared sovereignty

### I. Introduction

The Bombay government in the mid-1820s was caught in a dilemma. The semi-military post-war settlement, in which revenue and judicial duties were held by officers jointly, hindered the efficiency of both branches of government. William Chaplin, the Deccan Commissioner, explained that the revenue survey was necessary as the inequalities of assessment had ever pressurised the resources of the country and that, in order to make the survey effective, the collectors should devote their full time to the business of revenue. But ‘at least one half of every week being occupied by business in their criminal and civil courts which compels them some times to neglect their ordinary Revenue duties’. So, Chaplin recommended the introduction of a separate judiciary in the Deccan.<sup>1</sup> The separation of power was also desirable to make the judiciary more effective. The government’s judicial secretary David Greenhill explained that the delay of justice was considerable because the collectors were busy in their revenue business and the suits were dealt with by registers or young servants with little experience.<sup>2</sup> The need of transition from military to civil government was urgently felt.

But the chaotic situation in the Bombay presidency continued and even worsened during the 1820s. Particularly problematic were the ‘wild tribes’ in the frontiers. As C. A. Bayly argues, the colonial government was preoccupied

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<sup>1</sup> BL, IOR P/399/33, BJC 12 May 1824, 2753–62. W. Chaplin to Gov., 14 Apr. 1824.

<sup>2</sup> BL, IOR P/399/49, BJC 5 Oct. 1825, no. 31, D. Greenhill, memorandum, n.d.

with the need of controlling the tribal populations.<sup>3</sup> It was important not only because it was vital for the Company to ensure the regular supply of timber for housing and ship-building,<sup>4</sup> but also because it was related to the very problem of political authority and sovereignty of the Company in the plains. The tribal people actively negotiated and disputed with the government over land tenures, and rebellion was part of the negotiation.<sup>5</sup> As Ananda Bhattacharyya argues regarding the rebellions of fakirs (wandering armed ascetics) in late-eighteenth-century Bengal, the government officials were urged to curtail the activities of such nomadic populations for the sake of protecting zamindars and ryots under its rule and ascertaining stable revenue collection.<sup>6</sup> The situation was the same in the Deccan in the 1820s.

As F. B. Robinson argues, the fear of raids was part of the political structure of Bombay in the 1820s, and, as Ajay Skaria argues, ‘Bhil chiefs were often as powerful in times of “peace” as in those of “disturbance”’.<sup>7</sup> The provinces of the Deccan, Konkan and Gujarat were haunted by gang robberies by the Kolis, Ramusis and Bhils. Their raids increased as the British conquest and establishment of subsidiary system restricted their employment as mercenaries.<sup>8</sup> The most notorious were the Bhils in the Deccan Khandesh.<sup>9</sup>

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<sup>3</sup> Bayly, *Indian society*, passim. For recent studies, see Prathama Banerjee, ‘Writing the Adivasi: Some historiographical notes’, *IESHR*, 53, 1 (2016), 1–23.

<sup>4</sup> Richard H. Grove, *Green imperialism: Colonial expansion, tropical island Edens and the origins of environmentalism 1600–1860* (Cambridge, 1995), 380–99.

<sup>5</sup> Uday Chandra, ‘Flaming fields and forest fires: Agrarian transformations and the making of Birsa Munda’s rebellion’, *IESHR*, 53, 1 (2016), 1–30.

<sup>6</sup> Ananda Bhattacharyya, ‘The wandering fakirs of Bengal: Heroes or villains?’, *South Asia Research*, 36, 1 (2016), 1–23.

<sup>7</sup> Bruce Frederick Robinson, ‘Adaptation to colonial rule by the “wild tribes” of the Bombay Deccan 1818–1880: From political competition to social banditry’ (Univ. Minnesota Ph.D thesis, 1978); Ajay Skaria, *Hybrid histories: Forests, frontiers and wildness in western India* (Oxford, 1999), 131.

<sup>8</sup> Radhika Singha, *A despotism of law: Crime and justice in early colonial*

In Khandesh, there were 50 chiefs with 5,000 followers whose subsistence depended on plundering.<sup>10</sup> In the Northern Konkan, during the six years between 1820 and 1825, a total of 483 robberies were reported. The arrest of the robbers was extremely difficult.<sup>11</sup> During the same period, 3,163 robbers were implicated but only 406 were arrested.<sup>12</sup> The raids were facilitated by the absence of police establishment in some villages. In the Poona district, for example, 11 out of 49 villages in Pabbul pargana and 131 out of 177 villages in Sewngur pargana had no police establishments.<sup>13</sup>

The situation in Gujarat was equally bad. The government villages were troubled by raids and collection of tributes by the ‘refractory’ chiefs (called *girasias* and *mehwasis*) of the Bhils, Kolis and Rajputs who exercised various seigniorial rights and privileges including a power of life and death.<sup>14</sup> Some of them retained large armed forces.<sup>15</sup> Because of the raids, the city of Ahmedabad, and its eastern districts of Dholka, Ranpur, Dhandhuka and

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*India* (Oxford, 1998), 191–2.

<sup>9</sup> For Medieval history of the Bhils, see Nandini Sinha Kapur, ‘The Bhils in the historic setting of western India’, Rudolf C. Heredia and Shereen F. Ratnagar (eds.), *Mobile and marginalised peoples: Perspective from the past* (New Delhi, 2003), 145–66.

<sup>10</sup> N. Benjamin and B. B. Mohanty, ‘Imperial solution of a colonial problem: Bhils of Khandesh up to c. 1850’, *MAS*, 41, 2 (2007), 345.

<sup>11</sup> Singha, *Despotism of law*, 194–9.

<sup>12</sup> *Thana gazetteer*, ii. 634. The ratio of robbers to arrests were 132:41 for 1820, 193:112 for 1821, 733:73 for 1822, 807:72 for 1823, 204:80 for 1824, 1094:28 for 1825.

<sup>13</sup> Choksey, *Early British administration*, 81, R. K. Pringle to H. D. Robertson, 29 Mar. 1824.

<sup>14</sup> SRJ, iii. 677, M. Elphinstone, minute, 15 Aug. 1821; Hiroshi Fukazawa, ‘Agrarian relations: Western India’, in Dharma Kumar and Meghnad Desai (eds.), *The Cambridge economic history of India, volume 2, c.1757–c.1970* (Cambridge, 1983), 190.

<sup>15</sup> In Dholka, the chief of Koth had 2,000 militia and 150 horse, the chief of Gangad had a constant force of 1,000, and the chief of Bhavnagar had 6,000–7,000 infantry and 500–2,500 cavalry. *Ahmedabad gazetteer*, 147n1; John Clunes, *An historical sketch of the princes of India: stipendiary, subsidiary, protected, tributary, and feudatory, with a sketch of the origin and progress of British power in India* (Edinburgh, 1833), 195



Ghoga, were 'in a most disturbed state'.<sup>16</sup> Further north, in Mahi Kantha, the Koli raids were so frequent that the government separated the region from Kathiawar in 1821 to enable a more vigilant control, under which the securities were taken from the girasia chiefs to ensure their tranquillity, but the raids and feuds among the chiefs continued.<sup>17</sup>

The Bombay government knew that the problem was not a mere matter of law and order which should be dealt with by the police but the one which required a major remodelling of the mode of sovereignty in the region. Elphinstone's government tried to adapt the Maratha mode of sovereignty with a significant modification. On the one hand, the government inherited the confederacy of sardars or military gentry in the hills and the plains from the peshwa. These natives of rank were encouraged and promoted to exert their sovereignty in their territories, above all to devise the police by themselves and prevent the raids of the tribals. This idea was suggested to Elphinstone by his mentor Thomas Munro, the governor of Madras. As Burton Stein shows, initially Munro had taken hostile policies against the poligars (petty chieftains) in the Ceded Districts, which was expressed in the 1812 *Fifth Report*. But he later changed his mind and, in 1818, advised Elphinstone that the British government in the Deccan should inherit the position of the peshwa and allow the Maratha sardars to continue their rights, powers and employments of soldiers.<sup>18</sup>

On the other hand, the mode of shared sovereignty between the sardars

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<sup>16</sup> *Ahmedabad gazetteer*, 196.

<sup>17</sup> *Gaikwads of Baroda Maharaja Sayajirao II A. D. 1821 to A. D. 1830* (*Selections from the Baroda Residency Records*), ed. G. B. Pandya (Baroda, 1958), 152–5, Gov. to F. D. Ballantine, 6 June 1821, F. D. Ballantyne to James Williams, 8 June 1821; Gov. to F. D. Ballantyne, 11 Apr. 1822.

<sup>18</sup> Burton Stein, *Thomas Munro: The origins of the colonial state and his visions of empire* (Oxford, 1989), 84, 88, 233–7, 306.

and the tribal chiefs should be discontinued. Before the arrival of the British, the sovereignty in the plains land in the Deccan and Gujarat was shared by the hill tribes. The tribal chiefs provided the plains powers watchmen in times of peace and military men in times of war, and, in turn, they were given rent-free lands cultivated by the village headmen, allowed to collect dues (giras) from the plains villages and, in cases of non-payment, raided them. In this sense, the villages were co-shared by the sardars in the plains and the chiefs in the hills, and they both exerted sovereignty over the villages.<sup>19</sup> This was well known by the officials in India. In his ‘summary of the operations in India’ in 1823, the Marquis of Hastings, the governor general, stated that ‘I saw the intimacy of connexion between the Pindarries and the Mahrattas so distinctly, as to be certain that an attempt to destroy the former must infallibly engage us in a war with the whole body of the latter’.<sup>20</sup> Based on this recognition, the officials feared less the sardars’ open resurrection than the decline of the sardars’ social control which would unleash the raiders. This was indicated by Malcolm’s later comment:

I am further convinced, that though our revenue may increase, the permanence of our power will be hazarded, in proportion as the territories of native princes and chiefs fall under our direct rule. There are now none of the latter who can venture to contend against us in the field. They are incapable, from their actual condition, of any dangerous combination with each other, *and they absorb many elements of sedition and rebellion.*<sup>21</sup>

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<sup>19</sup> Skaria, *Hybrid histories*, 124–75; Wink, *Land and sovereignty*, 189–99; Sumit Guha, *Environment and ethnicity in India 1200–1991* (Cambridge, 2006), 97, 108–21, 132–3.

<sup>20</sup> PP 1831–32 (734), app. 94.

<sup>21</sup> Malcolm, *Government of India*, 153, J. Malcolm to T. Hyde Villiers, Secretary to the Board of Control, 26 Mar. 1832. Emphasis is mine.

Malcolm explained elsewhere that the sardars were ‘useful, if conciliated, in preserving the local peace, and dangerous to it if outraged or displaced’.<sup>22</sup>

As we shall see below, the Bombay government in the 1820s curtailed the hill tribes’ exercise of sovereignty by paying the giras to the chiefs from its treasury, making them promise not to raid the villages, and severely punishing the raiders with its military force. On the other hand, as was done by Munro in Madras,<sup>23</sup> Elphinstone exempted the sardars from the Company’s Court and vested them with police authority. By doing so, the government made a distinction between the unrespectable raiders and respectable sardars, suppressed the former, and promoted the latter as the co-sharer of sovereignty. The government’s decision should be paramount in times of war and emergency, but the ordinary management of the villages should be conducted by the sardars in the mofussil.

Crucial for this attempt was the control of the judiciary to realise the government’s monopoly of political power. Elphinstone was convinced that the government should be the sole arbiter of political relations in the mofussil and that the courts of law should not meddle with them. He was critical of Cornwallis’s judicial system because it unsettled agrarian relations by allowing ‘the Aduwluts to fix their new relations to each other. This led to an infinity of lawsuits. ... An incidental effect of the same mistake was the overthrow of the village corporations, the ruin of the police, and the horrors of dacoity’.<sup>24</sup>

The Elphinstone code of 1827, comprising 33 regulations of civil,

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<sup>22</sup> *The correspondence of Lord William Cavendish Bentinck, Governor-General of India 1828–1835*, ed. C. H. Philips, 2 vols. (Oxford, 1977), i. 27, J. Malcom to C. Williams Wynn, 19 Apr. 1828.

<sup>23</sup> Stein, *Munro*, 261–5.

<sup>24</sup> Colebrooke, *Life of Elphinstone*, ii. 116–7.

criminal, revenue and military branches, was such an attempt.<sup>25</sup> The regulations stipulated various exceptions from the civilian administration of law. I argue that, by specifying these exceptions, the government attempted to demarcate the realm of politics under the exclusive control of the government and the realm of law managed by the regular courts of law. By doing so, the government aimed at achieving a greater regularity and efficiency in ordinary revenue and judicial business and, at the same time, a more secure ground of intervention in times of emergency. What emerged from this attempt was not a civil society based on the rule of law but a conquest society internalising the logic of emergency.

## II. Post-war settlement

Immediately after the end of war in 1818, Elphinstone had explained that the main principles of civil government were ‘to consider everything subservient to the conduct of the war, and scrupulously to avoid all sorts of innovations’.<sup>26</sup> One important ramification of this was that the executive should firmly control the judiciary. So, even in the regulation areas, he transferred the power of zilla magistrate from the judges to the collectors.<sup>27</sup> Elphinstone’s vision of criminal justice and police was, as in the case of civil judicature, based on his negative evaluation of the Bengal system under Cornwallis. Among others, he lamented the evil of ‘the abolition of the ancient system of Police’, particularly ‘the removal of responsibility from the Zemindars; the loss of

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<sup>25</sup> BL, IOR V/8/24.

<sup>26</sup> *Poona Affairs: Elphinstone’s embassy Part 2 1816–1818*, ed. G. S. Sardesai (Poona Residency correspondence, xiii, 1953), 408, M. Elphinstone to F. Rawdon-Hastings, Gov.-Gen, 18 June 1818.

<sup>27</sup> Reg. III of 1818

their natural influence as an instrument of Police'.<sup>28</sup> In order to remodel the police in accordance with 'the ancient usages of the country', the previous police officers sent by the government (foujdars and tanahdars) were abolished, and the head of villages (patils) and native collectors of districts (kamavisdars) were vested with responsibility of policing in the government lands. The magistrates and criminal judges were both in charge of supervising these officers, but the zamindars were left to be the head of the police in their territories.<sup>29</sup>

Elphinstone was convinced that effective government could only be possible in collaboration with the sardars or armed gentry in the mofussil, 'the real rulers in the country',<sup>30</sup> and tried to make them the agent of indirect rule. He believed that in India, the judicial system was centred on the logic of power. The law in India was 'constantly influenced by the direct and lawful interference of the prince, who was fountain of all law, and by the weight of rank and wealth and interest. Indeed, the practice of the country was in a great measure the law of the strongest'.<sup>31</sup> His intention was that the British government should appropriate the political system of the Maratha confederacy, in which the peshwa assumed the role of the great king who shared sovereignty with the sardars, the head of the little kingdoms in the mofussil. This mode of sharing of sovereignty in which the little kingdoms partook of the power of the great king while retaining their autonomy was a standard practice in pre-colonial South Asia, as works by Dirks, Wink, Skaria and Berkemer and Frenz have shown.<sup>32</sup> The government emulated the Indian

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<sup>28</sup> Elphinstone, *Report*, 56.

<sup>29</sup> Reg. IV of 1818

<sup>30</sup> Colebrooke, *Life of Elphinstone*, i. 250–1.

<sup>31</sup> Colebrooke, *Life of Elphinstone*, ii. 54, M. Elphinstone to Henry Strachey, 28 Feb. 1819.

<sup>32</sup> Nicholas B. Dirks, *The hollow crown: Ethnohistory of an Indian Kingdom*

way of politics in its newly conquered territories.

The sardars, literally ‘commanders’ or ‘warlords’, were the local military noblemen gathered around Baji Rao’s court at Poona. Some of them originated in the old landholding families with the status of deshmukh, but others were the arrivistes who rose to the status of gentry by procuring their subordinate soldiers to the military labour market in the seventeenth and eighteenth centuries. They held alienated lands under surinjams, jagirs and inams and functioned as the centre of local economy and politics.<sup>33</sup> Their prominence was a marked feature of western India, where the proportion of alienated lands far exceeded that of Northern India.<sup>34</sup> The government emphasised that the lands held by the sardars, particularly those of the Patwardhans in the Southern Maratha Countries, were prosperous and better managed than the government lands.<sup>35</sup> An official said that the revenue could be realised ‘with greater facility and infinitely less expense’ from these chiefs in the form of tributes than directly collected by the government officials.<sup>36</sup>

But their treatment was a sensitive matter. As Ballhatchet argues, the jagirdars and sardars lost their aspiration for major scale rebellions after the

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(Cambridge, 1987), Wink, *sovereignty*, Skaria, *Hybrid histories*, Georg Berkemer and Margret Frenz (eds.), *Sharing sovereignty: The little kingdom in South Asia* (Berlin, 2003); Georg Berkemer and Margret Frenz, ‘Little kingdoms or princely states? Trajectories towards a (theoretical) conception’, *Indian Historical Review*, 32, 2 (2005), 104–21.

<sup>33</sup> Neil Charlesworth, *Peasants and imperial rule: Agricultural and agrarian society in the Bombay Presidency 1850–1935* (Cambridge, 1985), 27–8; Wink, *Land and sovereignty*, 37–8; Richard M. Eaton, *A social history of the Deccan 1300–1761: Eight Indian lives* (Cambridge, 2005), 188–92.

<sup>34</sup> Eric Stokes, *The peasant and the raj: Studies in agrarian society and peasant rebellion in colonial India* (Cambridge, 1978), 51–4; Laurence W. Preston, *The dev of Cincvad: A lineage and the state in Maharashtra* (Cambridge, 1989), 12–3.

<sup>35</sup> PP 1831–32 (735-III), 164, W. H. Sykes, evidence, 10 Apr. 1832; J. Malcolm, minute, 22 Feb. 1829, quoted in Guha, *Agrarian economy*, 37–8; Edward W. West, *A memoir of the states of the Southern Maratha Country* (Bombay, 1869), 37, T. Munro to M. Elphinstone, 28 Aug. 1818.

<sup>36</sup> Clunes, *Princes*, 32.

Third Maratha War, as the treaties with these sardars after the war reduced their armies.<sup>37</sup> The expulsion of the Arab mercenaries significantly reduced the fluid military force which could be mobilised by the sardars in times of war.<sup>38</sup> But the contemporary government officials could not be assured of the security of the British rule in the early 1820s. The British policing in the mofussil was best characterised by its weakness.<sup>39</sup> Elphinstone commented that the failure to deal with them could be fatal: ‘The destruction of so many great chiefs could not fail to throw the country ... into great confusion’ as the peshwa had experienced in his last days.<sup>40</sup> Chaplin commented that, under the Maratha confederacy, the sardars provoked commotions by resisting the mamlatdars (the peshwa’s district officers) or connived with them, usurped the revenue of the state and oppressed the ryots.<sup>41</sup> So the government’s conciliation policy should be accompanied by means of controlling them.

The government protected the privileges of the sardars and in turn demanded that they maintain the tranquillity of their territories. They were allowed to act as sovereigns within their territories and governed according to

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<sup>37</sup> Ballhatchet, *Social policy*, chapter 4.

<sup>38</sup> Guha, *environment and ethnicity*, 138–9.

<sup>39</sup> See, for example, David Arnold, *Police power and colonial rule: Madras 1859–1947* (Delhi, 1986); David M. Anderson and David Killingray (eds.), *Policing the empire: Government, authority and control, 1830–1940* (Manchester, 1991). See also R. Gregg, ‘Uneasy streets: Police, corruption and imperial progressives in Bombay, London and New York City’, in W. Jordan and E. Krieke (eds.), *Corrupt histories* (Rochester, NY, 2004), 337–85; Robert Gregg, ‘Valleys of fear: Policing terror in an imperial age 1865–1925’, in Kevin Grant, Philippa Levine, and Frank Trentmann (eds.), *Beyond sovereignty: Britain, empire and transnationalism c. 1880–1950* (Basingstoke, 2007), 169–90; Mike Brogden, ‘The emergence of the police: The colonial dimension’, *British Journal of Criminology*, 27, 1 (1987), 4–14; Clive Emsley and Georgiana Sinclair, ‘Bobbies abroad’, *History Today*, 61, 10 (2011), 49–51. Radhika Singha, *A despotism of law: Crime and justice in early colonial India* (Oxford, 1998), 37–8.

<sup>40</sup> Colebrooke, *Life of Elphinstone*, i. 250–1.

<sup>41</sup> Choksey, *Aftermath*, 208, W. Chaplin to Gov., 18 Nov. 1820.

‘the ancient custom of the Maratha Empire’:

They must have the entire management of their own jagheers, including the power of life and death, and must not be interfered with by the Government, unless in case of very flagrant abuse of power or long continuance of gross mismanagement.<sup>42</sup>

Apart from the exemption of land taxes, they were given several privileges as their ancient rights. These privileges were confirmed in individual sanads to the sardars.<sup>43</sup> In turn, the sardars were to do their police duties. The sanad to Chintaman Rao, for instance, stipulated it as follows:

you will attend to the prosperity of the ryots of your jaghire, to the strict administration of justice, and the effectual suppression of robberies, murders, arsons, and other crimes. This article is an essential condition of the present Agreement; you must therefore indispensably maintain the good order of your country.

In turn, the ‘British Government will maintain your rank and dignity as it was maintained under His Highness the Peishwa’.<sup>44</sup>

Elphinstone took the same policy of conciliation towards the chiefs of tribes in order to make them responsible for the tranquillity of their followers. Elphinstone approved the political agent of Khandesh John Briggs’s proposal to restore the jagirs resumed by Baji Rao to the chiefs, and allowed them to tax goods and passage of the hill roads as their privilege. Proclamations were issued to allow free pardon of previous crimes. The chiefs were given

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<sup>42</sup> West, *Southern Maratha Country*, cxxxviii–cxxxix, M. Elphinstone to Charles Theophilus Metcalfe, 18 June 1818.

<sup>43</sup> For example, see Aitchison, *Treaties, engagements and sanads*, viii. 258, the agreement with Chintaman Rao, dated on 15 May 1819.

<sup>44</sup> Aitchison, *Treaties, engagements and sanads*, viii. 258.



pensions and lands, and the jaglas (village watchmen) were employed and given provisions by the patils with the expense of the villages levied as the Bhil tax.<sup>45</sup> Henry Pottinger of Ahmednagar, for example, was instructed to ‘employ every means to conciliate the Beels and Ramoosees’ by pensioning their chiefs on condition that they were responsible for their people and by allotting small portions of rent-free lands if they cooperated with the patils in maintaining the village police.<sup>46</sup> The chiefs in the frontiers were also assigned the role of policing their territories. In Kathiawar, since the settlement of Alexander Walker in 1807, the Bombay government had tried to keep security by the ‘fa’el zamin’ or security bonds taken from the chiefs. The bonds obliged the chiefs not to annoy merchants and travellers and made them liable for compensation for the robberies and/or responsible for the production of the thieves. Elphinstone endorsed this policy and, for instance, newly taken a bond from the chief of Dasada in 1822.<sup>47</sup>

The problem was that, in Gujarat, the girasia and mehwasī chiefs’ social influence had been constantly weakened by the former governor’s policy. Nepean’s government was determined to deny the ‘the pretensions of the Grassias, Coolies, and Bheels, to the exercise of rights of sovereignty’ in order to increase the amount of quit-rent (salamee) from the alienated land (waunta).<sup>48</sup> Accordingly, the chiefs were required to abandon their due from

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<sup>45</sup> Choksey, *Early British administration*, 44–5, Government proclamation, 1 July 1819; Ballhatchet, *Social policy*, 124–34; Stewart N. Gordon, ‘Bhils and the idea of a criminal tribe in nineteenth-century India’, Anand A. Yang (ed.), *Crime and Criminality in British India* (Tucson, AZ, 1985), 128–39, 184–5; Benjamin and Mohanty, ‘Imperial solution of a colonial problem’; Guha, *Environment and ethnicity*, 131.

<sup>46</sup> Choksey, *Early British administration*, 10, M. Elphinstone to H. Pottinger, 2 Apr. 1818.

<sup>47</sup> Aitchison, *Treaties, engagements and sanads*, vi. 5–6, 35.

<sup>48</sup> SRJ, iii. 646–58, BRL, Gov. to CoD, 10 June 1815; SRJ, iii. 717–28 quotation at 718, BRL, Gov. to CoD, 28 May 1817.

the government villages and to accept the payment from the government's treasury. Their authority in the villages was weakened as village accountants (talati) were appointed. Elphinstone was concerned about these tendencies and ordered some measures to uphold their respectability: the talati was abolished, small chiefs were given leases, and the amount of tribute was fixed regardless of their revenue.<sup>49</sup> Also, the government did not abolish the old custom of private exactions, or tuggaza (or dhurna), to enable the sardars to recover debts from their revenue defaulters.<sup>50</sup> In 1826, Chaplin and Robertson suggested that the government allow it, though it was prohibited by the penal code, as it was 'a part of the common law'. The government endorsed that the tuggaza was, unless it was seriously injurious, not to be abolished.<sup>51</sup>

From the start, Elphinstone was concerned about the harmful effect of the British courts of law on the respectability and sovereignty of the sardars. In 1817 and 1818, the governor Evan Nepean introduced the Regulations in the territories of the Konkan and Gujarat immediately after their acquisition in the same year.<sup>52</sup> Elphinstone and even such district officers as Saville Marriott, who supported laissez-faire in revenue matters, were critical of this.<sup>53</sup> Elphinstone was convinced that the adjustment of dispute among the

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<sup>49</sup> Ballhatchet, *Social policy*, 165–8; *Ahmedabad gazetteer*, 180–1; Fukazawa, 'Agrarian relations', 190–1; Crispin N. Bates, 'The nature of social change in rural Gujarat: The Kheda district 1818–1918', *MAS*, 15, 4 (1981), 773–6.

<sup>50</sup> BL, IOR P/398/71, BJC 22 Mar. 1820, 1538–9, circular, 18 Dec. 1819.

<sup>51</sup> BL, IOR P/399/56, BJC 22 Feb. 1826, no. 34, W. Chaplin to Gov., 2 Feb. 1826.

<sup>52</sup> For Nepean's advocacy of laissez-faire policy, see Neil Rabitoy, 'System v. expediency: The reality of land revenue administration in the Bombay Presidency, 1812–20', *Modern Asian Studies*, 9, 4 (1975), 529–46; Neil Rabitoy, 'The control of fate and fortune: The origins of market mentality in British administration thought in south Asia', *Modern Asian Studies*, 25, 4 (1991), 737–64; Neil Rabitoy, 'Administrative modernisation and the Bhats of British Gujarat, 1800–1820', *IESHR*, 11, 46 (1974), 46–73.

<sup>53</sup> S. Marriott to M. Elphinstone, 19 Nov. 1818, quoted in Ballhatchet, *Social policy*, 168–9.

sardars 'should be considered as of a political nature, and conducted under the specific orders of the Government, and should not be managed as a district affair according to the ordinary regulations'.<sup>54</sup> He remarked in his *Report* that the degree of chiefs' powers before the conquest should be ascertained so as not to interfere in their privileges, but the British judges and magistrates tended to act 'with sternness and indifference to rank and circumstances very grating to the feelings of the Natives'.<sup>55</sup> Elphinstone emphasised the harmful effect of the courts of law on the girasia and mehwasī chiefs who should be treated as 'sovereign princes, with whom we have no right to interfere beyond the collection of a tribute'.<sup>56</sup>

So, in the Deccan, the government vested the Commissioner with the sole jurisdiction over the cases in which the sardars were the parties. He was also in charge of the internal and external relationship with various 'natives of rank' inside and outside the presidency as he was to distribute peshkush at the dasara and to deal with all the vakeels (agents) of the chiefs and sardars at Poona.<sup>57</sup> This meant that the sardars were exempted from the process in the Company's Court *de jure* as well as *de facto*, and put under the protection of the government.<sup>58</sup> For example, when Appa Desai murdered a young girl in 1825, Elphinstone decided that the British government could not interfere with the matter as the great jagirdars had had the power of life and death under the peshwa's government.<sup>59</sup>

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<sup>54</sup> West, *Southern Maratha Country*, clxxv, M. Elphinstone to C. Metcalfe, 7 June 1819.

<sup>55</sup> Elphinstone, *Report*, 66, 98; Ballhatchet, *Social policy*, 169.

<sup>56</sup> SRJ, iii. 683, M. Elphinstone, minute, 6 Apr. 1821; Ballhatchet, *Social policy*, 169.

<sup>57</sup> BL, IOR F/4/1035/28544, 32–5, John Malcolm, minute, 30 Jan. 1828.

<sup>58</sup> BL, IOR P/399/46, BJC 15 June 1825, no. 15, W. Chaplin to Gov., 28 May 1825.

<sup>59</sup> Ballhatchet, *Social policy*, 210. The treaty between the British government and Appa Desai is in Aitchison, *Treaties, engagements and sanads*, viii. 402.

In Gujarat, where the Regulations applied, the chiefs were exempted from the Company's Court by the orders of the government. In 1821, Elphinstone ordered that the girasia chiefs of Dholka should not be required to attend to the court personally except in cases of great necessity, and that instead of seizing and confining their persons, the judges should issue a precept to the collector to sequester their lands as might suffice for the gradual payment of the debt while leaving a decent maintenance for them.<sup>60</sup> Likewise, in 1822, the Political Agent in Kathiawar was ordered to ensure that the chiefs in Dholka, Ranpur, Dhandhuka and Ghoga under his authority were exempted from operation and penalties of British laws; that the judge or magistrate would notice chiefs when the case occurred, and he would exercise his discretion to punish or pardon them; and that the Agent was to avoid all the interference if the chiefs resided in the British territory.<sup>61</sup> In this way, the government devised indirect rule relying on the sardars in the mofussil.

### III. The mid-1820s Crisis

But the government was forced to realise the inadequacy of the policy by a series of armed rebellions in 1824. As we shall see below, they were caused by alliances between the raiders and the sardars, and this recognition influenced the government's policy in the later 1820s. These rebellions had two significant backgrounds. One was a severe famine of 1823–5. The drought affected the whole regions of the Deccan, the Konkan and Gujarat. The wet crops failed and the stock of cattle suffered a considerable diminution, which halted cultivation and the sowing of seeds. The district officials expected the

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<sup>60</sup> SRJ, iii. 683, Elphinstone, minute, 6 Apr. 1821.

<sup>61</sup> *Sayajirao II*, ed. Pandya, 235–6, Gov. to R. Barnwall, 23 Mar. 1822.

diminution of revenue, and they were concerned about the emigration of ryots from the government lands causing a loss of cultivating population.<sup>62</sup> The other decisive factor was the outbreak of the First Anglo-Burmese War (1824–6) which provoked a series of rebellions in Punjab, Delhi, Saharanpur and Malwa.<sup>63</sup> Charles T. Metcalfe observed that ‘the Burma War produced an extraordinary sensation all over India, amounting to an expectation of our immediate downfall’.<sup>64</sup> Malcolm later wrote that ‘the whole northern and western frontiers of India, as well as the countries recently occupied ... remained for some years in too unsettled a state to admit of large reductions of our military establishments’.<sup>65</sup> The commotions were also observed in the Deccan, which heightened the government’s general sense of crisis.

The most shocking was a large-scale armed rebellion in the independent state of Kittur in the Southern Maratha Country, in which the collector and Political Agent St John Thackeray was killed. It was important that the revolt originated in the government’s failure to settle the sardar’s family conflict. When the Desai of Kittur died in September 1824, Thackeray discovered a plot relating to the adoption of son by the chief minister of the country who also acted as the agent of the Bombay government. The adoption was not admitted and the chief minister was removed. Then, the Desai’s stepmother

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<sup>62</sup> BL, IOR/F/4/919/25867, BRL Gov. to CoD, 15 June 1825; Ibid., W. Chaplin to Gov., 29 Nov. 1823; Ibid., H. D. Robertson to W. Chaplin, 25 Nov. 1823; Ibid., W. Chaplin to Gov., 27 July 1824; *Selections from Deccan Commissioner’s files: Period of transition (1818–26)*, ed. R. D. Choksey (Poona, 1945), 14–21, H. Pottinger to W. Chaplin, 24 Sep. 1824. See also, Charles P. Campbell, ‘Bombay scarcity-relief policies in the age of reform, 1820–40’ (Canterbury Univ. Ph.D thesis, 2009).

<sup>63</sup> Dirk H. A. Kolff, ‘Rumours of the Company’s collapse: The mood of Dasahra 1824 in the Punjab and Hindustan’, Crispin Bates (ed.), *Mutiny at the margins: New perspectives on the Indian uprising of 1857: Vol 1, anticipations and experiences in the locality* (New Delhi, 2013), 25–42.

<sup>64</sup> Quoted in Kolff, ‘Rumours of the Company’s collapse’.

<sup>65</sup> Malcolm, *Government of India*, 1–2.

Channamma and her lieutenant one Sardar Gurusiddappa, ‘a notorious thief’, called for the rebellion. The rebels killed Thackeray and captured his British assistants. Worse, the insurgents were supported by the patils who should have been the bulwark of policing in villages. The rebels also sought support from the raja of Kolhapur, an independent chief of a branch of the Bhonsle family. The government issued a proclamation of free pardon and continuation of inams etc. of those who surrendered, and the sardars and sepoys in the country were warned not to join or support the rebels. Eventually the fort was surrounded by the armies from Bombay and Madras. The hostages were released and the fort was surrendered, but three were killed and 25 were wounded in total.<sup>66</sup>

The rebellion in Kittur corresponded with another major insurrection. In October 1824, the Pindaris in Gwalior led by one Shaikh Dallah caused a rebellion against the British and raided and burned the villages. The subah (governor) of Sindhia and other Maratha chiefs cooperated with him. Alarm in Bombay was heightened by the news that the rebels were joined by Chimnaji Appa, a younger brother of the ex-peshwa Baji Rao, who organised 75 cavalry and 100 infantry. A local banker and grain dealers supplied cash and provisions to the rebels. The Bhils also joined them and dominated Khandesh. Their actions were well organised, and the flow of information and logistics between Malwa and the Deccan was totally controlled by them.<sup>67</sup>

The rebellions of Channamma and Chimnaji Appa were not isolated examples. H. H. Wilson enumerated series of rebellions in the Bombay mofussil in late 1824 and early 1825. In Gujarat, the Kolis raided the villages near Baroda, escaped from the troops of the British and the Gaekwad and

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<sup>66</sup> West, *Southern Maratha Country*, 199–203; *Belgaum gazetteer*, 402–4.

<sup>67</sup> Kolff, ‘Rumours of the Company’s collapse’.

continued their plunder. Its leader could not be captured until 1829. More seriously, in Kutch, the Jhareja chiefs of Kathiawar plundered the British villages. They were instigated and helped to assemble a force of 2,000 by the Amirs of Sindh. The rebels demanded the restoration of their forfeited raja by saying that ‘we are Grasiyas: if you will restore Rao Bharmal Ji to the throne, we are all your servants’.<sup>68</sup> The raid was also observed further north in Palanpur.<sup>69</sup>

In the Deccan in 1824, a major rebellion was provoked by Umaji Naik, one of five leaders of the Ramusis in Poona district, who demanded the government restore to him the guardianship of a fort. He totally controlled the Purandhar taluka till 1827.<sup>70</sup> By 1827, he had entered on alliance with the raja of Kolhapur.<sup>71</sup> He issued a proclamation that the rajas, nobles and all others who were active in destroying the European gentlemen and their property would be conferred jagirs, inams and money by the new government.<sup>72</sup> In a smaller scale, a patel in Omraiz near Sholapur in the Southern Maratha Country refused to pay his revenue, fortified himself, and raided the neighbouring villages. The Company deployed the military but the campaign failed and some officials were killed.<sup>73</sup> The atmosphere of panic was felt even in Bombay city. Lady West noted in her journal, ‘One hears of nothing but disturbances all over the country. Poor Mr. Thackeray murdered at Kittoor,

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<sup>68</sup> H. H. Wilson, *The history of the British India from 1805 to 1835*, 3 vol. (London, 1848), iii. 168–79.

<sup>69</sup> *Sayajirao II*, ed. Pandya, 184–5, Deposition made by a wakil of the Rao of Booj, 27 Sep. 1824.

<sup>70</sup> F. Bruce Robinson, ‘Bandits and Rebellion in nineteenth century Western India’, Anand A. Yang (ed.), *Crime and criminality in British India* (Tucson, AZ, 1985), 52–3.

<sup>71</sup> Guha, *Environment and ethnicity*, 99.

<sup>72</sup> Prabhakar B. Draxe, ‘A failed revolt against the raj: The rebellion of the Berad, a criminal tribe, under the leadership of Umaji Naik’, *Social Change*, 35, 2 (2005), 127–30.

<sup>73</sup> Wilson, *History*, iii. 174–5.

and the people rising in many Places; all, it is supposed, in consequence of the ill-advised attack on Rangoon'.<sup>74</sup>

The series of rebellions in 1824 and the alliance between tribal raiders and the plains sardars observed in them—such as between the Kolis and the Ramusis and the Kolhapur raja, the Pindaris and Chimnaji Appa, or Kutch chiefs and the Amirs of Sindh—showed that the basic political structure of shared sovereignty survived in the early nineteenth century. The Purandhar Ramusis held some forty villages worth Rs 60,000 acquired when they resisted Bajji Rao in the Second Maratha War.<sup>75</sup> The cooperation was most markedly observed in the Third Maratha War of 1817–8, in which the Bhils were enlisted by the peshwa Bajji Rao, the Gond by Appa Sahib of Nagpur, and the Pindaris by Holkar and Sindhia.<sup>76</sup> From this perspective, as Dirk Kolff suggests, the series of catastrophic events in 1824 represented the potential political discontent which was always there and was simply more visible in 1824 than in other years.<sup>77</sup>

The state of crisis continued after 1824. The administration of criminal justice and police remained a major challenge. It was shown in the large number of cases instituted in the Company's Court:<sup>78</sup>

	<u>1825</u>	<u>1826</u>	<u>1827</u>	<u>1828</u>
<u>Old Provinces</u>				
Total complaints	8,012	7,416	7,363	8,530
Number of persons				

<sup>74</sup> Drewitt, *Memoirs of Edward West*, 161.

<sup>75</sup> P. W. Bradbeer, 'The role of the Kingdom of Satara in suppressing Deccan bunds 1812–1832', in A. R. Kulkarni and N. K. Wagle (eds.), *Region, nationality and religion* (Mumbai, 1999), 61–2.

<sup>76</sup> Guha, *Environment and ethnicity*, 121, 127, 138.

<sup>77</sup> Kolff, 'Rumours of the Company's collapse'.

<sup>78</sup> Calculated from PP 1831–32 (735-IV), Appendix, 233, CoD to Gov., 28 Mar. 1832.



Apprehended	10,352	9,228	9,347	10,786
Punished	7,608	6,470	6,778	7,673
Acquitted	2,646	2,975	2,700	3,126

#### Deccan

Total complaints	2,372	2,579	2,926	3,090
Number of persons				
Apprehended	3,951	3,919	4,298	4,517
Punished	2,657	2,348	2,433	2,696
Acquitted	1,274	1,572	1,828	1,887

The actual number of crimes must have been larger because many cases were unreported as people disliked to go to the magistrate.<sup>79</sup> The raids by the wild tribes continued. In Gujarat, a bhagat (holy men) named Govindas Ramdas raided villages, declared the end of the British raj, and proclaimed himself king in Kaira in 1826.<sup>80</sup> In the Deccan in 1827, Umaji Naik again organised raiders. He issued a proclamation that thereafter the people should pay their rent to him; otherwise, they should be punished with fire and sword.<sup>81</sup> The government could not control the situation and pardoned all the raiders under Umaji. He was appointed the head police officer of Purandhar and neighbouring talukas, granted some land and pension and remembered as ‘the second Sivaji’.<sup>82</sup> The guerrilla war in Kittur continued, and another widespread rebellion happened in 1829. This time, the insurgents were ‘aided more or less actively, by the whole population of the province’. Again the Desai’s adopted son was established, and the British military had to be sent as the Kittur shetsundees (militia) refused to serve.<sup>83</sup>

The major result of the 1824 crisis was that the government hardened its

<sup>79</sup> Chaplin, *Report*, 141.

<sup>80</sup> Vinayak Chaturvedi, *Peasant pasts: History and memory in western India* (Berkeley, CA, 2007), 90; *Kaira gazetteer*, 120.

<sup>81</sup> *Thana gazetteer*, ii. 635.

<sup>82</sup> Robinson, ‘Bandits and rebellion’, 52–3; *Poona gazetteer*, iii. 38.

<sup>83</sup> West, *Southern Maratha Country*, 203–4.

attitude towards the tribal raids. This was clearly expressed in the government's policy towards the Bhils. The government's conciliatory policy changed in 1825. In that year, a more aggressive policy of 'amelioration' was commenced with the establishment of the Bhil Agencies and the Bhil Corps in Khandesh. The North West, North East and Southern Bhil Agents promoted the Bhils' settlement and cultivation by issuing a pass to each Bhil and inquiring and adjusting the giras of the chiefs. Free pardon was given to those who surrendered. Waste lands were given rent-free with loans and provisions. The Bhil Corps were aimed at the suppression of the raids by the military enlisted among the Bhils themselves. The idea was supported by Elphinstone, Chaplin and Khandesh Collector A. Robertson. Lieutenant James Outram was in charge of enlisting and commanding the corps. The regularly-drilled Bhils numbered more than 250 in 1826, replacing former regular military outposts.<sup>84</sup> Malcolm's government endorsed the policy and recommended employing the mehwasī chiefs as the police force.<sup>85</sup> The most sizable campaign by the Bhil Corps was the suppression of the Dang Bhils carried out in 1830.<sup>86</sup> The change in the Bhil policy clearly shows that the government wanted to curtail the sovereignty of the Bhil chiefs and to reform and transform them into the government's village servants.

The government also concluded separate treaties with other chiefs and ordered them not to commit any depredations in the British and adjacent territories. For example, the tribal chiefs of the Rewa Kantha entered engagements with the British government in 1825 and 1826 promising 'to

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<sup>84</sup> A. K. Prasad, *The Bhils of Khandesh: Under the British East India Company (1818–1858)* (Delhi, 1991), 212–41.

<sup>85</sup> Malcolm, *Government of India*, appendix, 70–3, J. Malcolm, minute, 30 Nov. 1830

<sup>86</sup> Skaria, *Hybrid histories*, 157–62.

conduct ... according to the orders of the government, after the manners of ryots ... in obedience to the instructions of the thanas of government'.<sup>87</sup> A similar security bond promising 'to behave in a peaceable and proper way, as ryots, according to the order of the sarkar' was taken by the government in 1830 from the chiefs of Mahi Kantha.<sup>88</sup> These engagements show that the status of the lesser chiefs was reduced from the semi-sovereign chiefs to the ryots, the object rather than the agent of policing.

#### IV. The realm of law and the realm of politics

A more permanent solution to the critical situation in the mofussil was sought by means of the Elphinstone code of 1827. The regulations were characterised by the stipulations of various exceptions to the general rules. First, the governor was given an unlimited power 'in cases of war and rebellion'. He could declare the suspension of the all laws in such instances. Acts of treason or rebellion could be tried in the court martial, and the other crimes and offences and the general police of the country 'shall be conducted as the Governor in Council may prescribe for the occasion'.<sup>89</sup> Besides, a Special Court was established to try 'treason, rebellion, unlawful attempt to alter the established laws, and disturbing the peace of foreign states'.<sup>90</sup> The governor could authorise the district police officers to detain prisoners longer than stipulated in the law, and village headmen could detain prisoners longer than usual if there were 'indispensable reasons'.<sup>91</sup>

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<sup>87</sup> Aitchison, *Treaties, engagements and sanads*, vii. 153, 185–97

<sup>88</sup> Ibid., 73, 101–6.

<sup>89</sup> Reg. I of 1827, ss. 8–11.

<sup>90</sup> Reg. XIII of 1827, s. 26; Reg. XIV of 1827, ss. 12–15.

<sup>91</sup> Reg. XII of 1827, s. 43, c. 4 and s. 50, c. 4.

From our perspective, it was particularly important that the government claimed its exclusive control over all the sardars based on 'reasons of state'. This was clearly shown in Regulation XXV of 1827 'for the confinement of state prisoners and for the attachment of the lands of Chieftains and others for reasons of state'. The preamble explained the following conditions as the 'reasons of state':

the due maintenance of the alliances formed by the British Government with foreign powers, the preservation of tranquillity in the territories of native Princes entitled to its protection, and the security of the British dominions from foreign hostility and from internal commotion.

By this regulation, the governor was empowered to confine the state prisoners or to attach the lands of sardars without any previous judgement of the courts of law and place them under the temporary charge of the collector. The treatment of the state prisoners was checked by the circuit judge, but the collector could suspend the order of the judge.<sup>92</sup>

The government devised further specific exceptions by three regulations: Regulation XXX on the mode of introducing the separate judiciary in the Deccan, Regulation XV on the sardars' police authority, and Regulation XXIX on the exemption of sardars from the Company's Court. By looking at the process of enactment, I suggest that these regulations concerning exceptions of the ordinary rule were important in determining the general contour of the government's judicial policy in the mofussil.

The governor and the members of the council unanimously agreed in 1825 that separate zilla judges and the sadr adalat were to be introduced in the

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<sup>92</sup> Reg. XXV of 1827.

Deccan and that the regulations were to be applied in these courts.<sup>93</sup> However, they disagreed on the degree of uniformity in the judicial system. Elphinstone wanted to give more power to the men on the spot in the Deccan than in other provinces as a necessary preparation. He proposed to assign the zilla judge with the duties of circuit judge, which was usually held by a puisne judge of the sadr foudari adalat. But Francis Warden insisted that the regulation system had been successfully tested in the Old Provinces and should be introduced in the Deccan without exceptions. He said that too many preparatory measures had shaken the confidence of the natives. ‘Rules and forms’ were vital to achieving efficiency, which was ‘wholly dispensed with in the Deccan’.<sup>94</sup> From this perspective, he also suggested that the sadr adalat should be moved from Surat to Bombay, which would be more efficient and economical and lead ‘to the formation of a code of consistent precedents’.<sup>95</sup>

Elphinstone responded that even the Old Provinces were under the British government merely for six or seven years; only the native judicial system was tested by experience to be able to preserve the ‘peace and tolerable security’ of the country.<sup>96</sup> He thought that the British system was still too imperfect to allow universal application: ‘we are so far from having attained perfection in any of our arrangement in Indian that we are by no means entitled to leave off experiment’.<sup>97</sup> So he preferred to have different judicial systems in the Deccan and the Old Provinces and furnish both with a

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<sup>93</sup> BL, IOR P/399/49, BJC 5 Oct. 1825, no. 31, D. Greenhill, memorandum, n.d.

<sup>94</sup> Ibid., no. 36, D. Greenhill, memorandum, n.d.; Ibid., no. 41, F. Warden, minute, 21 Sep. 1825.

<sup>95</sup> Ibid.; BL, IOR P/399/61, BJC 14 June 1826, no. 1, F. Warden, minute, 11 May 1826.

<sup>96</sup> Ibid., no. 44, M. Elphinstone, minute, n.d.

<sup>97</sup> BL, IOR P/399/61, BJC 14 June 1826, no. 1, M. Elphinstone, minute, n.d.

seat of sadr adalat.<sup>98</sup> For him, regularity was not synonymous with uniformity and centrality. The debate continued in 1826. Warden emphasised ‘the great advantage of a uniformity of system’.<sup>99</sup> Elphinstone restated the advantage of Indian system: ‘In the Deccan we were trying to ascertain how far it was possible to adhere to the native system and to exclude our own. We have perhaps been too hasty in giving up so much more we should not give’.<sup>100</sup>

In the end, the council endorsed Elphinstone’s view, and exceptions of the general rule of criminal justice and police were stipulated in Regulation XXX of 1827. The police jurisdiction of the sadr stations (cities of Poona and Ahmednagar) was not held by the judges but by the collectors (s. 2, c. 1). The criminal judge combined the power of the court of sessions and the Special Court trying political cases (s. 3, c. 1). The court of sessions sat continuously throughout a year (s. 5). The magistrates could sentence 2 years’ imprisonment instead of 2 months (s. 2).

The next important policy of exception was related to the rights and privileges of the sardars. In order to deal with the crisis, the government planned to devise special measures to exempt the sardars from the harmful effects of the judiciary. Chaplin pointed out that they should make considerable modifications in regulations regarding the independent chiefs and great and lesser jagirdars, because the regulations ‘might be found too unbinding and likely to occasion disgust to our subjects of high rank in the Dekhan and

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<sup>98</sup> Ibid., M. Elphinstone, minute, 9 May 1826. It was eventually decided that it was removed from Surat to Bombay by Governor Malcolm in 1828. Orby Mootham, *The East India Company’s sadar courts 1801–1834* (Bombay, 1983), 125–6.

<sup>99</sup> BL, IOR P/399/64, BJC 18 Oct. 1826, no. 33, F. Warden, minute, n.d.

<sup>100</sup> BL, IOR P/399/61, BJC 14 June 1826, no. 1, M. Elphinstone, minute, n.d.

consequent disaffection to our Government'.<sup>101</sup>

The government's intention was that the social status of sardars should be protected and promoted so that they could police their own lands as the sovereign landholders. In order for this, by Regulation XV of 1827, the government vested the sardars with the police jurisdiction in their territories. They were also exempted from the Company's criminal jurisdiction when the actions were related to policing. As we saw above, these measures were already in force in the Deccan. The government aimed at expanding them to the Old Provinces under the regulations.<sup>102</sup> It particularly targeted the chiefs of mehwasias and girasias in Gujarat, who were 'subject to the Regulations in law but exempt in fact'. They were named 'landholders' in the title of the regulation because, Elphinstone explained, 'no one word which comprehend all Grasseas, Meweysees, Jageerdars, Enamdars, &ca &ca'.<sup>103</sup> This shows that the control of the tribal raids was the chief purpose of this regulation.

The draft regulation was first sent by the regulation committee to the government in May 1824. It said that the sardar was expected 'to maintain the public peace throughout his jurisdiction, to apprehend public offenders, to try and to punish offences according to the authority conferred on him by his sunnud'. He was also to deal with 'occasions of necessity, such as the apprehension of public offenders, or the defence of the country against marauders, or an enemy'. The potential of chiefs to act abusively was examined by the zilla magistrates, but they were also given discretion not to do so because, if 'too rigid an adherence to forms is expected ... he will find

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<sup>101</sup> BL, IOR P/399/33, BJC 12 May 1824, 2753–62. W. Chaplin to Gov., 14 Apr. 1824.

<sup>102</sup> Ballhatchet, *Social policy*, 169.

<sup>103</sup> BL, IOR P/399/56, BJC 1 Mar. 1826, no. 32, M. Elphinstone, minute, n.d.; BL, IOR P/399/62, BJC 5 Aug. 1826, no. 77, Secretary's memorandum, July 1826; Ballhatchet, 169–70.

his situation irksome and would cease to think it respectable'. It was circulated to the sadr adalat and the zilla magistrates for their opinions.<sup>104</sup>

The measure was favourably received by the district officers. Thomas Williamson, the acting collector of Kaira in Gujarat, welcomed the measure. He explained that currently the police agent of the government was badly received in the locality, and his process was frequently attended with impediments and failures. He expected the merit of the regulation as follows:

Many of these Chieftains are now placed on the footing of common subjects under the immediate controul of Kamavisdar and Police Agent, who, however useful they may be to us, are frequently men of low birth, and not very delicate in the exercise of their authority, and whose official superiority cannot be otherwise than very disagreeable to Chiefs. ... These evils the Regulation appears well calculated to correct.<sup>105</sup>

William James Lumsden, the magistrate of Surat, also expressed his favourable opinion; H. D. Robertson, the magistrate of Poona, stated that it would repose the sardars and have 'the effect of conciliating their attachment to our rule'.<sup>106</sup>

But the district officials expressed a shared concern about the harmful effect of the British court of law. They worried about the regulation committee's proposal that the abuse of the chiefs should be checked by the judiciary. Archibald Robertson, the collector of Khandesh, recommended that the government rather than the Company's Court should take cognizance of

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<sup>104</sup> BL, IOR P/399/35, BJC 30 June 1824, 3690–711, Regulation Committee to Gov., 12 May 1824.

<sup>105</sup> BL, IOR F/4/1046/28729, 2-3, BJC 19 Jan. 1825, no.46, Thomas Williamson to Gov., 5 Jan. 1825.

<sup>106</sup> BL, IOR F/4/1045/28727, 75–7, BJC 13 Oct. 1824, William James Lumsden to Gov., 5 Oct. 1824; BL, IOR P/399/46, BJC 15 June 1825, no. 15, W. Chaplin to Gov., 28 May 1825, H. D. Robertson to W. Chaplin, 3 Nov. 1824.



the criminal offenses of the *sardars*. Chaplin agreed that serious abuses were prevented at present only because the British government gave due attention to their respectability. The time had not yet come to confine the powers of the chiefs and to make them amenable to the British courts.<sup>107</sup> R. Boyat, the acting collector at Broach, even articulated that the sardars should not touch regulations:

Even now, there is scarcely one of them that I know who is at all acquainted with our Regulation. People who are most about our Cutcherries are mere hacking dealers in law, and know little or nothing excepting what is bad. Into the hands of such people I am persuaded too, the chieftains must fall in the end.<sup>108</sup>

The proper methods of conciliation and control were further debated in the governor's council, and again Elphinstone's proposition of discretion was confronted with Warden's insistence on regularity. Warden insisted that the sardars should be tried and punished in the Company's Court. But Elphinstone said that the regulation was too intrusive into their inner management of the territory and that they should not be required to keep records of their proceedings. He was especially concerned about the summons of the sardars to the court. The summons should be issued only in cases of necessity by a letter, not by a subpoena. The chiefs should be allowed to sit by the judges and should be 'treated in all respects with the courtesy usual among equals'. Finally, these orders should be conveyed not as a regulation but as an order of the government.<sup>109</sup>

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<sup>107</sup> BL, IOR P/399/46, BJC 15 June 1825, no. 15, W. Chaplin to Gov., 28 May 1825.

<sup>108</sup> BL, IOR F/4/1045/28727, 215–62, quotation from 258, R. Boyat to Gov., 20 Nov. 1824, BJC 1 Dec. 1824.

<sup>109</sup> BL, IOR P/399/56, BJC 1 Mar 1826, nos. 25–35, 37; BL, P/399/58, BJC

Here again, with some compromise, the view of Elphinstone and the collectors was reflected in the final draft.<sup>110</sup> The governor was empowered to put landholders under his immediate authority alone or to order the particular jurisdiction and procedure to which they were subjected (s. 14). Though the sardars were required to keep records of their proceedings (s. 10), they were allowed to be tried in a court of circuit or a special court which could be held privately. In these courts, no one should be excluded whom the landholders wished to be present; and ‘any forms of courtesy and consideration due to the rank of the accused shall also be observed’ (s. 18). In this way, out of 657 surinjam and enam estates in the Deccan, 104 sardars were vested with police authority.<sup>111</sup>

The fact that the government confirmed the exemption of the sardars from the ordinary process of law was important. They were formally put outside the regular working of the British legal process. By excluding them, the government made it clear that the *de facto* legal pluralism should be made *de jure*. It was decided that the affairs of higher rank sardars were not legal but political in nature and thus to be solely dealt with by the government. As we will see in the next chapter, the intervention of the King’s Court was contrary to this policy. If the native chieftains were tried in the Supreme Court as a Company’s servants, it would shake not only the foundation of the local police system, but also the structure and principle of the judicial system based on the exceptions of sardars.

The government intended to further strengthen the authority of chiefs

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19 Apr. 1826, no. 13, M. Elphinstone, minute, 15 Apr. 1826.

<sup>110</sup> BL, IOR F/4/1046/28729, 275, BJC 12 July 1826, no. 23, Gov. to Regulation Committee, 6 July 1826.

<sup>111</sup> BL, IOR P/399/46, BJC 15 June 1825, no. 15, W. Chaplin to Gov., 28 May 1825.

and sardars by exempting them from the Company's civil and criminal jurisdiction more generally.<sup>112</sup> In 1825 Chaplin proposed lists of sardars who should be exempted from the ordinary process of the Company's Court. It included a total of 232 persons categorised into three classes. The first class of sardars, 22 in number, were wholly exempted from the process of the courts; the second class, 45, were exempted from the ordinary process but 'may be requested to answer demands either by letter or by their wukeels as may be most expedient'; the third class, 165, were subject to jurisdiction of the sadr adalat but exempted from attending the trial in person.<sup>113</sup>

Elphinstone proposed that the civil cases filed against these sardars should be dealt with by a special agent appointed by the government. The agent should be empowered to compound decrees which were already passed and to effectuate the compromise of debts and, 'even in the clearest case of debts', to allow the sardar to keep his house and a portion of his income 'sufficient for his decent maintenance'. The trial should be held not in a public Cutcherry but 'should be conducted rather according to the forms of a Durbar than those of a Court of Justice'.<sup>114</sup> Warden opposed these measures by advocating the principle of 'uniformity' and 'efficiency'. He insisted that the ordinary appeals should go to the sadr adalat and not to the government, as the latter lacked experience and assistance of the native law officers.<sup>115</sup> But

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<sup>112</sup> BL, IOR P/399/56, BJC 1 Mar. 1826, nos. 35-6, Secretary, memorandums, n.d.

<sup>113</sup> BL, IOR P/399/52, BJC 31 Dec. 1825, no. 1, W. Chaplin to Gov., 25 Nov. 1825. BL, IOR P/399/59, BJC 10 May 1826, no. 61, W. Chaplin to Gov., 8 Apr. 1826, and nos. 62-5; BL, IOR P/399/62, BJC 5 Aug. 1826, no. 75, W. Chaplin to Gov., 8 July 1826. For the original lists, see BL, IOR P/399/64, BJC 18 Oct. 1826, no. 31, list of sardars.

<sup>114</sup> BL, IOR P/399/64, BJC 18 Oct. 1826, no. 30, M. Elphinstone, minute, 5 Sep. 1826.

<sup>115</sup> BL, IOR P/399/64, BJC 18 Oct. 1826, no. 33, Warden, minute, 26 Sep. 1826.

his view was a minority; Goodwin endorsed Chaplin and Elphinstone's plan, and the first Agent for Sirdars was appointed in January 1827.<sup>116</sup>

The detail was stipulated in Regulation XXIX of 1827. The sardars were classified into three classes, and the list was furnished to the Agent for Sirdars. All civil suits against them were solely cognizable by the Agent. The trial of the first and second class were solely based on the consideration of privilege, custom and usage, and the case was appealable to the governor. The trial of the third class was also based on custom and usage with some relaxed regulations, and their cases were appealable to the *sadr diwani adalat*.<sup>117</sup> In this way, the suits against the sardars were categorised to be adjusted outside the ordinary court of law. The government was to be the sole authority to deal with them through the Agent for Sirdars. In this way, the introduction of the regular system of law was suspended by the governor and district officers' political sense of crisis. The sardars were by no means exempted from the government's vigilant eyes. As we already saw, Regulation XXV of 1827 allowed the government to attach the persons and lands of sardars by 'reasons of state'. What was vital was that the cases of political importance should be dealt with solely by the government, not by the court.

The government supplemented this exemption scheme with another, equally important stipulation in the same regulation. The section 6 stated that the Company's civil courts in the Deccan could not take cognizance of following cases:

All claims for damages against persons in authority under the late Government, for abuse of power during that period; All claims against

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<sup>116</sup> BL, IOR P/400/2, BJC 10 Jan. 1827, no. 87, Gov. to G. W. Anderson, 4 Jan. 1827.

<sup>117</sup> Reg. XXIX of 1827, ss. 3–5.

Government on account of enams; All claims against Government on account of jagheers, wurshasuns [religious pensions], pensions, neemnooks [fixed annuities], and other advantages not hereditary; All disputes regarding public rent or revenue payable to Government, and all complaints of exaction by mamlutdars, or district or village officers; All claims on account of village debts, all village boundary disputes, and disputes regarding the use of wells and watercourses.<sup>118</sup>

This meant that the government put the affairs of all service gentry of the former government and holders of alienated lands (even if they were not on the list of sardars) under its exclusive control, and that it exempted itself from liability in the municipal courts in relation to its policies of land and revenue. This article survived as late as 1876.<sup>119</sup> In this way, Elphinstone's new judicial arrangement clearly ordered that the political concerns of the government should be exempted from the Company's judiciary.

The next governor John Malcolm further strengthened this system of judicial exemption. Malcolm pointed out some problems of the Agent for Sirdars. First, as the first Agent George William Anderson was also the judge of the sadr adalat, he could not spend enough time for the cases of sardars, and they fell into great arrears. Second, as he was stationed in Bombay, he could not easily look at the revenue and judicial record in Poona.<sup>120</sup> Third and most seriously, the presence of the Agent in Bombay induced the sardars to come to Bombay or to send and keep their vakeels there. Malcolm wanted to prevent the sardar's contact with the Bombay lawyers. He explained the evils as follows:

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<sup>118</sup> Reg. 1827, s. 6.

<sup>119</sup> Jamietram Nanabhai and Chimanlal Harilal Stelvad (eds.), *Bombay Acts and Regulations with notes, decisions, notifications, &c.* (Bombay, 1894), 31.

<sup>120</sup> Malcolm, *Government of India*, Appendix, 10–11, J. Malcolm, minute, 10 Nov. 1830.

It would be attended with an expenditure which the limited income of those chiefs renders them unable to afford, they would live in a society which even in its native branches is altogether uncongenial to their present habits and sentiments, and continually mixing with it would early have one of two effects. They would either be disgusted and discontented, or by forming acquaintance with artful men imbibe imperfect and indistinct ideas of our institutions and courts of law that might eventually involve both them and the Government in trouble and embarrassment.<sup>121</sup>

In order to deal with the problem, thereafter the zilla judges of Poona were appointed the Agents.<sup>122</sup> Furthermore, in 1828, Malcolm introduced a new officer styled the Deputy Agent for Sirdars stationed at Poona, who could use his entire time to deal with the suits against the sardars ‘for the purpose of effectual and permanent separation of the transactions of the privileges classes from those of others’. John Warden was appointed the first Deputy Agent.<sup>123</sup> Malcolm further conferred civil jurisdiction to the jagirdars by Regulation XIII of 1830 and expanded the jurisdiction of the Agent for Sirdars to disputes on land. He experienced some conflict over the issue of regularity and discretion with Romer, but overall his government followed Elphinstone’s trail.<sup>124</sup>

The government’s policy of exemption was favourably received by the sardars. They petitioned the government to be included in the lists, and the number of sardars on the lists increased rapidly. The initial list of the first class sardars contained 20 names. Only a year later, 14 new applicants were

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<sup>121</sup> BL, IOR F/4/1035/28544, 9–11, BJC 30 Jan. 1828, J. Malcolm, minute, 16 Jan. 1828.

<sup>122</sup> John A. Dunlop (1828–30), Saville Marriott (1831–6). *East India register and directory*.

<sup>123</sup> BL, IOR F/4/1035/28544, 45, J. Malcolm, minute, 30 Jan. 1828.

<sup>124</sup> BL, IOR, L/PJ/3/918, 205–20, 257, BJC, Gov. to CoD, 1 Dec. 1830 and 24 Dec. 1830; PP 1831–32 (735-IV), Appendix, 232, CoD to Gov., 15 Feb. 1832.

accepted. To the second class list of 57 was added 56, and to the third class list with 160 names was added 117. So the grand total doubled from 237 to 494 in a year.<sup>125</sup> It seems that the actual working of the agent was also agreeable to the government. John Warden reported in 1832 that the Agent accommodated ‘without the expense and vexation of regular law suits’ 218 out of 308 claims; 967 claims were preferred to the Deputy Agent, who amicably adjusted 810. There were few arrears: between 1827 and 1832, the Agent and the Deputy Agent could not dispose of only 73 out of 1,376 cases.<sup>126</sup> The Bombay government confidently reported the result to the Court of Directors (See Table).<sup>127</sup> Overall, the Agent seemed to work well. The cases of debt recovery, family dispute, and revenue matter were all decided by the Agent with consideration of specific situations of sardars.<sup>128</sup>

The trouble was the King’s Court. From the start, Elphinstone was concerned about the King’s Court’s interference in the affairs of sardars. Elphinstone asked the Advocate General George Norton whether the Supreme Court could take cognizance of the cases under the Agent of Sirdars. His specific concern was that the Agent was regarded as lacking any legal authority. He even asked the Advocate General about the possibility of conferring the authority of the court of record to the governor for this

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<sup>125</sup> Names of 70 not ascertained above were added to the above number. BL, IOR F/4/1035/28544, 31, J. Malcolm, minute, 30 Jan. 1828.

<sup>126</sup> BL, IOR P/400/61, BJC 23 Jan. 1833, nos. 97–101, John Warden to Gov., 31 Dec. 1832.

<sup>127</sup> BL, IOP L/PJ/3/919, 269, BJL, Gov. to CoD, 6 Feb. 1833.

<sup>128</sup> BL, IOR P/400/18, BJC 18 June 1828, nos. 8–11, John Warden, Deputy Agent, to Gov., 28 May 1828, *Khooshaldass Damoodhurdass v. Mahomed Hurreef Moonshee*; BL, IOR P/400/18, BJC 18 June 1828, nos. 21–4, John Warden, Deputy Agent, to Gov., 28 May 1828, *Row Gunness Pansey v. Rumma Baee, widow of Gunput Rao Pansey*; BL, IOR P/400/27, BJC 10 June 1829, nos. 37–41, J. A. Dunlop to Gov., 1 June 1829, and BL, IOR P/400/30, BJC 4 Nov. 1829, nos. 1–8, J. A. Dunlop to Gov., 25 Sep. 1829, *Rungoo Wisswanath Nisbit Zukatey v. Bhasker Ram Gokla*.

purpose.<sup>129</sup> Norton replied that it was illegal, only admissible under the peshwa's despotic government.<sup>130</sup> Elphinstone established the Agent without any further measures on this point, and, as we shall see in the next chapter, his fear was realised.

## VI. Conclusion

This chapter argues that, driven by the crisis in the mid-1820s, the government decided to expand its conciliation policy towards the chiefs and sardars. It was deemed essential for the effective mofussil governance, especially for policing the wild tribes. What the government was doing was demarcating the boundary between respectable and unrespectable chiefs.<sup>131</sup> The government protected and promoted the former to use them in the form of indirect rule in the mofussil. The government articulated that the affairs of sardars were in the realm of state necessity, outside the realm of law. The post-war settlement in the Deccan was confirmed and expanded to the whole presidency, in which the sardars were regarded as sovereigns in their territories and vested with extraterritoriality. The tribal chiefs should be deprived of the sovereignty in the plains and, if they failed to keep tranquillity, became the object of policing either by the government or by the respectable sardars. They were, with the rest of the subjects, subjected to the municipal

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<sup>129</sup> BL, IOR P/399/66, BJC 31 Dec. 1826, no. 7, Gov. to G. Norton, 21 Dec. 1826.

<sup>130</sup> BL, IOR P/400/2, BJC 31 Jan. 1827, no. 47, G. Norton to Gov., 6 Jan. 1827.

<sup>131</sup> As Lakshmi Subramanian shows, the Bombay government took the same policy (initiated by Alexander Walker) at the sea by distinguishing the fair traders and the lawless pirates. Lakshmi Subramanian 'Piracy and legality in the Northward: Colonial articulation of law, custom and policy in the late eighteenth- and early nineteenth-century Bombay presidency', *Journal of Colonialism and Colonial History*, 15, 1 (Jan 2014).



law and put to the realm of regularity.

Ballhatchet points out that Elphinstone had to codify hitherto informal privileges of chiefs in the regulations ‘to protect them from the zeal of egalitarian Judges’, suggesting that the new administrators would substitute the rule of men with the rule of regulations.<sup>132</sup> The codification of the sardar’s exemption indicates that, contrary to Ballhatchet’s suggestion, the realm of men would not be vanished. The exemption of political discretion from the realm of civil/legal regularity was the essence of colonial governance. The newly conquered territories would remain ‘new’ during the British raj, because even after the introduction of regulations, the working of law was only buttressed by exemptions of certain state necessities. The division between the realm of law and the realm of politics became the defining characteristic of the political structure of colonialism.<sup>133</sup> As we will see in the next chapter, the King’s Court denied this, and exercised its jurisdiction over the political affairs of sardars, which was conceived to be threatening the entire system of Company’s colonial domination. In other words, as opposed to the government, the King’s Court posed its own version of political order.

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<sup>132</sup> Ballhatchet, *Social policy*, 246.

<sup>133</sup> Cf. Samera Esmeir, ‘On the coloniality of modern law’, *Critical Analysis of Law*, 2, 1 (2015), 19–41.

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Table 1: Suits disposed of by the Agent

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Original Suits: Adjusted without resorting to law proceedings

	1827	28	29	30	31	32	Total
Claims preferred	0	11	89	15	77	26	218
Claims Accommodated	0	2	84	17	80	35	218
Remaining in hand	-	-	-	-	-	-	0

Original Suits: Regular Suits

Claims filed	23	1	5	1	1	1	32
Suits disposed of	12	1	3	4	8	1	29
Remaining in hand	-	-	-	-	-	-	3

Appeals from the Deputy Agent

	1827	28	29	30	31	32	Total
Appeals filed	2	10	8	8	15	15	58
Disposed of	0	0	8	2	21	12	43
Remaining	-	-	-	-	-	-	15

Grand Total

Disposed of	12	3	95	23	109	48	290
Remaining	-	-	-	-	-	-	18

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Table 2: Suits disposed of by the Deputy Agent

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Adjustment without resorting to law proceedings

	1828	29	30	31	32	Total
Claims	64	230	216	188	163	861
Accommodated	14	206	222	232	136	810
Remaining	-	-	-	-	-	51*

\* All preferred in the last 3 months (Oct-Dec

1832)

Regular Suits	125	36	24	60	35	280
Disposed of	68	60	30	72	46	276
Remaining	-	-	-	-	-	4

Grand Total

Disposed of	82	266	252	304	182	1,086
Remaining	-	-	-	-	-	55

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## Chapter 5: Sardars, princes, and indirect rule

### I. Introduction

In 1825, Elphinstone instructed Chaplin to persuade Chintaman Rao, the most powerful sardar in the Deccan, about the danger of his coming to Bombay city:

1st. That His Majesty's Castle and Island of Bombay (or more legally speaking the County of Bombay) is under the exclusive control of H. M.'s Justices and H. M.'s Court of Recorder, and is governed according to the laws of England. 2nd. That in consequence the Governor has no power whatever to protect Chintamun Row or his followers from the ordinary operation of those laws, or from the rules of police which to them will be very irksome.<sup>1</sup>

In this passage, the government's determination to protect the sardars from the King's Court took the form of an awkward admission that the government was powerless in the presidency town, the very heart of its territorial empire. This was yet another sign of the fragility of the Company's sovereignty in the 1820s in its confrontation with the King's Court. The sovereignty of the government and the sardars were at once jeopardised by the King's Court's assertion of jurisdictional expansion, which would totally nullify the government's vision of indirect rule via the sardars.

The problem was not confined to the British territories, because the state of sovereignty was complex in Bombay in the 1820s. As we saw in the previous chapter, the chiefs and sardars in British India were given political, economic and social privileges which were equal to the 'independent princes'

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<sup>1</sup> Ballhatchet, *Social policy*, 207, M. Elphinstone to W. Chaplin, 9 May 1825.

such as the raja of Satara or the Gaekwad of Baroda. In turn, the independent princes were not so 'independent' because, like under the Maratha confederacy, the British government received tributes in the form of subsidiary alliance and advised on their internal affairs via the Political Residents. This heterogeneous constellation of sovereignty was, as Chaplin stated, the defining characteristic of the Deccan.<sup>2</sup>

For example, it was impossible without collaborating with and controlling the chiefs and princes in Indian India for the government to export Malwa opium, one of the most important sources of revenue in the 1820s. This was because the production of opium was entirely conducted in Indian India. The route of opium passage from Malwa to the west coast was also outside British India. The government was involved in difficult negotiations with the chiefs and princes. From 1823/24, the Company started to order the native chiefs in Malwa to sell opium to the Company at a fixed rate. Especially difficult was the negotiation with Indian princes to ban the passage of the smuggled opium. Sindhia, one of the most powerful independent chiefs and the single largest producer of Malwa opium, resisted the Company's restrictive policy and often supported the smuggling from Daman.<sup>3</sup>

So, instead of making the anachronistic distinction between 'British' and 'Indian' India, the issue of 'external' sovereignty should be considered in relation to that of 'internal' sovereignty and vice versa. In order to do so, we need to bridge the scholarly division between British India and Indian India.

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<sup>2</sup> BL, IOR, P/399/33, BJC 12 May 1824, 2753–62, W. Chaplin to Gov., 14 Apr. 1824.

<sup>3</sup> Amar Farooqui, *Opium city: The making of early Victorian Bombay* (New Delhi, 2006), 24–5, 30–1, 35–8; Celsa Pinto, *Trade and finance in Portuguese India* (New Delhi, 1994), 143–52. Sindhia's attempt eventually led to the abolition of the previous policy in 1830.

Although there are good studies on indirect rule in the princely states,<sup>4</sup> few works address its interconnectedness with the government's policies in British India. I offer a case study in this chapter by focusing on the King's Court's relationship with the sardars and independent princes. The intermixed and layered state of sovereignty influenced the government's judicial policy in the mofussil. The law easily transcended the boundary of 'colonial state', and, like the opium issue, the government had to make its judicial policies in reference to both internal (sardars') and external (independent princes') Indian India.

As we shall see below, the government wanted to deal with the chiefs and sardars in the foreign territories in the same way as those under its direct rule. This was because the raids by the wild tribes easily transcended the boundary of British and Indian India. On the one hand, the sardars in British India should be treated as independent princes who were exempted from the domestic system of the Company's Court. Their relationship with the government was more like international relations, in which both stood on the same footing without a superior tribunal. On the other hand, the sardars in the territories of the independent princes should be made to carry out the same policy of tribal policing as those in the British territories. Thus, for the government, while there was essentially no difference between the independent chiefs and the sardars in its territories, there was an insuperable gap between the sardars and other subjects such as the ryots or merchants in their status of sovereignty. As we saw in the last chapter, the government tried to consolidate this relation by putting the sardars under their exclusive control

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<sup>4</sup> Michael H. Fisher, *Indirect rule in India: Residents and the residency system 1764–1858* (New Delhi, 1991); Barbara Ramusack, *The Indian princes and their states* (Cambridge, 2003).

and outside the realm of law.

The problem was the King's Court. The government's attempt to privilege the sardars was confronted by the King's Court's assumption that there was only a single body of 'Indian subjects' in British India to whom the law was equally applicable and that British rule had nothing to do with the independent chiefs and their subjects. The judges did not admit the differentiation between sardars and other Indians based on political expediency. The sardars were prosecuted, and their persons and property were attached in the King's Court. They complained that it was injurious to their respectability and contrary to the government's promise to protect their privileges. The government, especially its district officials in the mofussil, strongly reacted against these cases.

But the sardars were not just passive victims of the King's Court, as the government and the sardars themselves tried to impress; they were active users of the King's Court, especially in their family conflicts. These cases were important because, as Pamela Price argues, the problems of power and authority were most clearly exposed in litigations over local magnates' inheritance and land tenure.<sup>5</sup> In addition, discontented with the government's intervention in the affairs of the sardars in their territories, the independent princes started to rely on the authority of the King's Court to resist the government's policies. They claimed that the King's Court had the power to redress the wrongs of the government and that they would 'appeal' to the King's Court if their demands were not admitted. The government conceived that this act of jurisdictional jockeying could subvert the Company's rule in India. The King's Court's cognisance of cases meant that the government could not control the affairs of the sardars, which was crucial for the

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<sup>5</sup> Price, "Popularity".

tranquillity in the mofussil. The King's Court disturbed the government's vision of sovereignty and indirect rule both in British and Indian India.

## II. Sardars and the King's Court

The inhabitants of the mofussil came to Bombay and filed complaints against the sardars in the King's Court. The government's policy of protecting the sardars, which led to the enactments of the regulations which we saw in the last chapter, could be nullified by the King's Court. There were indeed many such cases. Debt recovery was a major motive. As Chaplin reported, the sardars were 'in general much embarrassed by their creditors, notwithstanding that every possible consideration is extended to them in respect of their debts'.<sup>6</sup> In 1822, for instance, a writ of the King's Court was issued to Gunput Row Patwardhan of Shedball, one of the most powerful sardars in the Deccan. He was sued by a patil for debt. Gunput Row's vakeel explained that the patil came from Bombay with one or two persons claiming to be sent by the government. The patil said that he had obtained an adjustment in the King's Court, but did not show any authoritative documents. Chaplin cautioned that this kind of event would lower the dignity of chiefs, 'whom we are bound by our engagements to treat as independent and may have the effect of frightening them into a compliance with claims that are not legitimate'. He added that he had just received a complaint of a similar nature from Punt Sucheem (Pant Sachiv), a major jagirdars in the territory of the raja of Satara, who was under the protection of the British government.<sup>7</sup> The patil's attorney

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<sup>6</sup> Chaplin, *Report*, 162.

<sup>7</sup> BL, IOR P/385/19, BPC 20 Mar. 1822, 1571, W. Chaplin to Gov., 10 Mar. 1822.



W. A. Morgan explained that though he wrote a common letter of demand to Gunput Row, he did not know that he was a sardar. The government told Morgan not to grant any letter if the defendant was outside the jurisdiction of the King's Court.<sup>8</sup> Chaplin was not satisfied with Morgan's answer. He complained that Morgan did not appear to disclaim his right of interference except in the cases of sardars. He requested the government to tell him that their interference outside jurisdiction was 'a matter of supererogation'.<sup>9</sup>

The suits against the sardars sometimes obstructed the government's revenue policy relating to them. The government had promoted a policy to replace the sardars' huks (customary dues collected in the watan lands) with the payment by the government for their revenue collection in the government lands. This was aimed at relieving the burden of the ryots and to persuade the sardars to improve the cultivation of waste lands.<sup>10</sup> But in a suit against a sardar in the Northern Konkan in 1826, a Bombay creditor sued a sardar for debt and demanded the collector to pay part of the debt as the granter of the huks.<sup>11</sup> The government denied the jurisdiction of the King's Court as it was a matter of revenue. It further argued that the huks were not the payment for services and therefore, legally speaking, not 'debts' and attachable.<sup>12</sup> It might be necessary for the government to make this claim, for if this case was admitted, the government would be involved in many similar cases as the third party debtor.

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<sup>8</sup> BL, IOR P/385/21, BPC 3 Apr. 1822, 1934, W. A. Morgan to Gov., 27 Mar. 1822.

<sup>9</sup> BL, IOR P/385/21, BPC 17 Apr. 1822, 2244, W. Chaplin to Gov., 6 Apr. 1822.

<sup>10</sup> R. D. Choksey, *Economic life in the Bombay Konkan 1818–1939* (New York, 1960), 53.

<sup>11</sup> BL, IOR P/346/26, BGC 19 Apr. 1826, nos. 31–2, J. B. Simson to Gov., 11 Apr. 1826.

<sup>12</sup> Ibid., no. 68, G. Norton to Gov., 17 Apr. 1826; Ibid., no. 69, Gov. to J. B. Simson, 18 Apr. 1826.

The layered state of sovereignty complicated the government's engagement in the judicial management of the mofussil. This was especially true in Kathiawar, Gujarat, where the girasia and mehwasi chiefs shared sovereignty with the British and the Gaekwar of Baroda. It was best indicated by debt recovery suits against the Thakur of Bhavnagar. The city of Bhavnagar was a major port city in the region, trading with the Arabs and exporting the Malwa opium.<sup>13</sup> The Thakur incurred a large number of debts by his commercial transactions. His legal status was complex. His tribute to the Gaikwad was transferred to the British in 1807, and since then, he was under the protection of the British government. In this sense, he was an independent tributary prince exempted from British courts of law. But as a proprietor of the city of Bhavnagar and neighbouring villages in the Goga pargana, he was a subject of the British government amenable to its court. The government disliked the civil suits against him in the Company's Court, as he was a major girasia chief in the region important for suppressing the Kati and other raiders in his territories, but also sometimes instigated insurrections himself.<sup>14</sup> In 1827, for example, a Bania filed a suit against the Thakur in the Company's Court for the recovery of Rs 11,40,000. The Thakur claimed that he should be exempted from the British jurisdiction. The members of the council, Romer and Warden, insisted that he should be subjected to the adalat as his debt was incurred by his commercial transactions, but Governor Malcolm was determined to protect his status and suggested referring the case

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<sup>13</sup> G. D. Sharma, 'Ports of Gujarat in the nineteenth century: Trading networks and commercial practices', in Indu Banga (ed.), *Ports and their hinterlands in India (1700–1950)* (New Delhi, 1992), 199–212.

<sup>14</sup> Walter Hamilton, *A geographical, statistical, and historical descriptions of Hindoostan, and the adjacent countries* (London, 1820), 673–5; Walter Hamilton, *The East-India gazetteer*, 2 vols. (2nd edition, London, 1828), i. 232.

to arbitration.<sup>15</sup>

This already complicated situation was further exacerbated by the King's Court. In 1827, Advocate General George Norton reported one of such cases as follows. A person who called himself an agent of Thakur employed Solicitor James Patch to make a suit in the Supreme Court. Patch asked Norton to be the retainer. But when Norton perused the case, he discovered 'a system of fraud and conspiracy to abuse the process (by writ of execution on a fictitious judgement) of the Supreme Court in sweeping away some property of the Thakoor in Bombay'. He told Patch that if this business should be continued, he would report it to the government, and the case was withdrawn. Furthermore, Norton explained that this case was discovered when he was asked to take a retainer of another case, in which a Bombay merchant attempted to sue the Thakur for a wrongful seizure of property. He declined the offer, as he thought the Thakur was not amenable to the Supreme Court.<sup>16</sup> So the Thakur was about to be involved in two cases in the Supreme Court. The government confirmed that the Supreme Court did not have jurisdiction and told Norton that he was right in not accepting the retainer as he would be employed by the government to defend the Thakur if the suit was actually filed.<sup>17</sup>

These suits against the sardars should be considered in the context of more general use of the King's Court to challenge authority of social superiors in settled regions. As in Bengal, the government was concerned about the King's Court's harassment of the Indian revenue intermediaries such as patels

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<sup>15</sup> BL, IOR P/400/20, BJC 24 Sep. 1828, no. 39, J. Romer, minute, 5 Sep. 1828; BL, IOR P/400/20, BJC 24 Sep. 1828, no. 40, J. Malcolm, minute, n.d.

<sup>16</sup> BL, IOR P/386/18, BPC 14 Feb. 1827, no. 39, G. Norton to Gov., 30 Jan. 1827.

<sup>17</sup> Ibid., no. 40, Gov. to G. Norton, 10 Feb. 1827.

(village headmen) or deshmukhs (headmen of parganas).<sup>18</sup> For example, in the Southern Konkan in 1819, a patil was threatened by villagers via a Bombay attorney to stop exercising his ‘unlawful force and injury against’ them. The district judge cautioned that ‘any such interference with the revenue details of a recently acquired territory in particular must prove mischievous to the public interest and embarrassing to the local functionaries’.<sup>19</sup> This levelling effect was more problematic in the cases of sardars who controlled unsettled regions.

The problem was not confined to debt recovery suits by bankers and merchants against the sardars; the government officials were also concerned about the use of the King’s Court by the sardars themselves in their family conflict. Indeed the sardars used both the Company’s and the King’s Court for this purpose. The settlement of these suits posed a serious problem for the government, as it involved examinations of complicated facts such as kinship or joint-property relationship or titles of lands. Chaplin confessed that there was no prospect of early adjustment of the family conflict of the Patwardhans. He even admitted that the decisions in the Company’s Courts were useless in these disputes, for the European judges were unable to make a correct judgement and the parties were unlikely to agree with it. He could do nothing but leave them to solve the dispute by themselves.<sup>20</sup> In such a situation, the sardars naturally used the King’s Court as an option of their jurisdictional jockeying.

An early example was the case of Raja Rutton Singh in the Deccan in

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<sup>18</sup> For Bengal’s cases, see Jain, *Outlines*, 81–9.

<sup>19</sup> BL, IOR P/398/63, BJC 28 July 1819, 1816–7, J. W. Pelly to Gov., 21 May 1819.

<sup>20</sup> Chaplin, *Report*, 158. The dispute continued well into the 1840s. West, *Southern Maratha Country*, 46–58, 86–100.

1820. He was a sardar of Malegaon, near Baramati.<sup>21</sup> His father adopted a son before Rutton Singh was born. Both the father and the adopted son were dead, and the son of the adopted son named Ramchunder Judow Row claimed a share of the family property. The claim was examined by the panchayat, but Ramchunder employed Frederick Ayrton and sent a letter of demand to Rutton Singh and threatened that he would be sued in the Recorder's Court if he did not pay the money. Chaplin worried that it was injurious for the raja's high status: 'any meddling on the part of its inferior agents, amongst the natives of a conquered country, whose institutions are utterly at variance with many parts of the British Code would be attended with the most mischievous consequences'.<sup>22</sup> He emphasised that the first peshwa was originally in the service of raja's grandfather, and the family was in consequence very highly honoured by the peshwa. Ayrton apologised that he would be more careful in the future on the matter of jurisdiction, and this case was settled.<sup>23</sup>

The sardars used the King's Court with the help of European and Indian legal agents. The working of these agents was criticised by the government officials in a prolonged family conflict in the Mankeshwurs in the Deccan. The Mankeshwurs had been politically important under the peshwa's government. On the accession of Baji Rao II, Sadashew Punt Mankeshwur became one of his chief officers and eventually became the prime minister. He retained the position till his death in 1817. As he left no son, his widow adopted a distant relation, Luximon Row.<sup>24</sup> This succession generated a fierce

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<sup>21</sup> John Clunes, *Appendix to Itinerary and directory of Western India* (Bombay, 1828), 15. He was later entered in the civil list of the second class sardars. BL, IOR P/399/64, BJC 18 Oct. 1826, no. 31, list of sardars.

<sup>22</sup> BL, IOR P/398/70, BJC 9 Feb. 1820, 683–6, W. Chaplin to Gov., 26 Jan. 1820.

<sup>23</sup> BL, IOR P/398/71, BJC 8 Mar. 1820, 1232, Ollyett Woodhouse to Gov., 2 Mar. 1820.

<sup>24</sup> BL, IOR V/27/70/10, 63.

controversy with Sadasheew's nephew, Mulhar Row, who claimed a share of inheritance as a common property of joint family. The question was first submitted to the panchayat in 1819 and then referred to arbitration by H. D. Robertson, the collector of Poona.<sup>25</sup>

But instead of waiting for the Company's arbitration, Mulhar Row resorted to the King's Court. In March 1820, Mulhar Row employed Frederick Ayrton and sent a letter to the widow of Sadasheew Punt that he would institute a suit in the Recorder's Court if the case was not speedily decided by arbitration. Collector Robertson was particularly concerned about the working of Ayrton's Indian agent at Poona, one Luis Fernandes. Robertson explained that Mulhar Row 'had the folly' to promise to pay Fernandes a seven percent commission of the amount recovered from the opponent. Robertson ordered Fernandes to make out a bill, which exhibited Rs 1,500 in total including prices of consultations, documentations, drafting of cases and 'personal expenses'. Robertson commented that this bill would save Mulhar Row from 'his foolish bond for percentage' and prevent Fernandes, 'this jackal of the Bombay lawyer', from making any greater demand than was specified in it.<sup>26</sup> As to the arbitration, Robertson delegated it to his assistant William J. Lumsden, who decided in favour of Mulhar Row. Luximon Row appealed to the governor, but it was dismissed in 1822.<sup>27</sup>

However, the said Luis Fernandes himself used the King's Court to recover his profit which would have been gained from the business but prevented by Robertson. He filed a suit in the Recorder's Court against

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<sup>25</sup> Detailed records of this family conflict were compiled in one volume: MSA, JD, 1821–23, 10/10.

<sup>26</sup> BL, IOR P/398/72, BJC 5 Apr. 1820, 1599–601, H. D. Robertson to W. Chaplin, 25 Mar. 1820.

<sup>27</sup> BL, IOR P/399/16, BJC 21 Aug. 1822, 4942–55.

Mulhar Row for the non-payment of commission for ‘work and labour’ amounting to Rs 37,000. Fernandes employed another Bombay attorney William Fenwick and demanded the widows not to hand the share to Mulhar Row. Mulhar Row declared that he never met Fernandes after he left Poona in 1820 and no ‘work and labour’ was done by him. Chaplin disgustingly reported that this was another attempt of ‘the inferior law practitioners in Bombay to establish a footing in cases which appear to me to be absolutely and entirely out of the jurisdiction of the Recorder’s Court’. He and Robertson thought that ‘there is something very nefarious in this claim’ and its object was ‘to frustrate the words of Government’.<sup>28</sup> Robertson recommended the government to prosecute Fernandes for false claims and threat, pointing out that the case was instigated ‘with the design of having Mulhar Row detained and harangued in Bombay’.<sup>29</sup> Acting Advocate General George Norton explained that, as the case was not instituted and the judgement was not given in the Recorder’s Court, the notice had no effect, which was probably obtained by Fernandes ‘as a contrivance to frighten Mulhar Row into some settlement or compromise of his suit’.<sup>30</sup> It seems that no suit was filed in the court.

The family conflict itself continued. Although Malhar Row was allowed his share, he disputed the amount, and eventually his jagir was temporarily resumed by the government.<sup>31</sup> The final decision of the Privy Council was given as late as 1831.<sup>32</sup> During the interval, both parties repeatedly petitioned

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<sup>28</sup> BL, IOR P/399/21, BJC 29 Jan. 1823, 362–4, W. Chaplin to Gov., 10 Jan. 1823.

<sup>29</sup> Ibid., 364–7, H. D. Robertson to W. Chaplin, 6 Jan. 1823.

<sup>30</sup> BL, IOR P/399/21, BJC 12 Feb. 1823, 547–50, G. Norton to Gov., 11 Feb. 1823.

<sup>31</sup> BL, IOR P/399/25, BJC 8 July 1823, 3030, Gov. to W. Chaplin, 3 July 1823.

<sup>32</sup> *Asiatic Journal*, New Series, 5 (1831), 107–9; 2 Knapp, 60.

the government through Chaplin. He once even requested the government to take some measure to deal with their frivolous references.<sup>33</sup> Two years before the judgement in the Privy Council, when Luximon Row accompanied Governor Malcolm in his tour in the Deccan, Malcolm expressed his desire to release him from bad and designing advisors, who first involved his family in a law suit, and now encouraged him to appeal to the King in Council. Malcolm stated that the cost of appeal was so great that the family would be ruined even if they won the cause. He conceived 'the strong necessity of some modification in this part of Indian legislature, which from its delays and expenses must in most instances prove efficient to no purpose but the ruin of natives, who from a spirit of litigation, or ignorance, of the consequences, became involved in such suits'.<sup>34</sup>

The Mankeshwur case shows that the sardars could use the King's Court for their own profit, and attorneys and their agents were available for that purpose. Luis Fernandes, a Portuguese, was such a figure. He embodied the proximity of the world of law and that of violence in early nineteenth-century India. He was from a notorious family in the Deccan. Before the Third Maratha War, his brother Joseph de Souza was employed in the commissariat department of the Poona subsidiary force. He was arrested by the government for conspiracy of communicating with a Pindari chief of Burhanpur to release a state prisoner (a relation of the Holkar) under the custody of the Peshwa. The examination by the government showed that the brothers John de Souza, Joseph de Souza and Luis Fernandes acted as the intermediaries of sardars employing and mobilising the raiders such as the Arabs and the Bhils.<sup>35</sup> His

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<sup>33</sup> BL, IOR P/399/25, BJC 18 June 1823, 3027, W. Chaplin to Gov., 17 June 1823.

<sup>34</sup> BL, IOR F/4/1173/30650, 27, J. Malcolm, minute, 22 Feb. 1829.

<sup>35</sup> BL, IOR F/4/501/11941, 1–127, BPL, Gov. to CoD, 22 Aug 1815 and its



social influence was shown in a case in 1823 in which he was arrested for beating a peon but released by ‘about 75 Portuguese who severely beat the constable and other police officers’.<sup>36</sup> These connections with the world of sardars, wild tribes and lawyers might have raised the officials’ sense of danger on the King’s Court’s meddling with the affairs of the sardars.<sup>37</sup>

Some cases more directly provoked security concerns. The arrest of a sardar Ramchunder Chowdry in 1820 caused a sensation in the Deccan. He was arrested under a writ of attachment issued in a case for damage of Rs 40,040 in the Recorder’s Court presided over by George Cooper. The case had been decided in the panchayat, but the plaintiff Balum Bhat Watwey, Peshwa’s former military commander<sup>38</sup> and probably Chowdry’s under-farmer, was dissatisfied with the result and petitioned to the government. When it was rejected, the plaintiff resorted to the King’s Court. He hired the *bête noir* Frederick Ayrton as his attorney. Chowdry was released by paying the security.<sup>39</sup>

Reporting the case, Chaplin commented that the case required a special attention in order to avert ‘the acknowledged evils of introducing amongst natives of the interior foreign laws, which are totally at variance with their

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enclosures.

<sup>36</sup> BL, IOR P/399/26, BJC 27 Aug. 1823, 3535–42, E. H. Baillie to Gov., 13 Aug. 1823.

<sup>37</sup> For the Maratha military labour market, see Dirk H. A. Kolff, *Naukars, rajput and sepoy: The ethnohistory of the military labour market in Hindustan 1450–1850* (Cambridge, 1990); Randolph G. S. Cooper, *The Anglo-Maratha campaign and the contest for India: The struggle for control of the South Asia military economy* (Cambridge, 2003).

<sup>38</sup> Cf. *Poona affairs: Close’s embassy 1801–1810*, ed., G. S. Sardesai (Poona Residency correspondence, vii, Bombay, 1940), 455–6, H. Russell to Governor General, 27 Jan. 1810.

<sup>39</sup> BL, IOR P/398/77, BJC 1 Nov. 1820, 4744–8, W. Chaplin to Gov., 26 Oct. 1820.

habits and prejudices'. He demanded that the government 'take an active part in maintaining the integrity of the jurisdiction of its own courts from the encroachments of the Recorder's Court'. He pinpointed that the arrest of Chowdry was illegal (1) because he had never been to Bombay and therefore was not under the jurisdiction of the Recorder's Court, (2) because he was a minor and not personally liable to responsibility of debt, (3) because the point in litigation had been decided in the panchayat, from which no appeal was made, and (4) because the sheriff could arrest him only if he was found in his district. Chaplin recommended that the Company's Solicitor should institute a suit in the name of Chowdry against the sheriff in order to recover the damage of false arrest and imprisonment.<sup>40</sup>

The news of the arrest stirred the country. Henry Pottinger, the collector of Ahmednagar, reported that 'a very considerable sensation has been excited amongst all classes of our new subjects and of whom ... many are similarly situated with the Chowdry'. Pottinger warned that, if it was admitted, 'the whole country must inevitably be thrown into a state of confusion and alarm which will put a stop to everything else'.<sup>41</sup> This was because Chowdry was a revenue farmer of the peshwa. Before the British conquest, the sardars were appointed the revenue farmer of their districts by the peshwa's government. They paid a fixed amount of revenue to the peshwa and were given the judicial and magisterial authorities. They confiscated the lands and properties of revenue defaulters and sold them to recover debt.<sup>42</sup> Elphinstone explained the mechanism under which the discontents relating to the farming system

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<sup>40</sup> BL, IOR P/398/77, BJC 1 Nov. 1820, 4745–7, W. Chaplin to Gov., 26 Oct. 1820.

<sup>41</sup> BL, IOR P/398/78, BJC 29 Nov. 1820, 5131, Henry Pottinger to W. Chaplin, 15 Nov. 1820.

<sup>42</sup> For the revenue farming, see Wink, *Land and sovereignty*, 339–75.

were accumulated:

The party in the wrong could always, by a bribe, prevent his cause going to a Panchayat, or overturn the decision of one. An appeal lay from the under-farmer to the upper, whose income depended on the exactions of the authorities below him; and from him to the Minister, who never received a complaint without a present; or to the Peshwa, who never received one at all. In consequence the Government afforded little justice to the rich, and none to the poor.<sup>43</sup>

Now these claims were flooded into the Company's Court. Pottinger explained that he repeatedly declined to take cognizance of these claims of damages as they were done under the authority of the peshwa. If the claim against Chowdry was admitted in the King's Court, many of these old and dormant claims amounting to 'crores of rupees' would be instantly brought forth.<sup>44</sup>

The government requested the Recorder's Court to supersede the order. The new recorder William Evans issued an order that Chowdry was not amenable to the court. Morgan proposed to prosecute Watwey for forgery in Poona adalat and to issue a proclamation about the jurisdiction.<sup>45</sup> But the proclamation was not issued because Chaplin feared that it would give publicity to the affair and instigate similar recourse to the King's Court.<sup>46</sup> The government's sense of crisis was strongly expressed in its letter to Calcutta, which was not submitted but kept on the record.<sup>47</sup> It would require the Supreme Government to apply to the home authority to define the jurisdiction of the King's Court, in order 'to guard against the great degradation which the

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<sup>43</sup> Elphinstone, *Report*, 90–1.

<sup>44</sup> BL, IOR P/398/78, BJC 29 Nov. 1820, 5131, Henry Pottinger to W. Chaplin, 15 Nov. 1820.

<sup>45</sup> Ibid., 5132, W. A. Morgan to Gov., 21 Nov. 1820.

<sup>46</sup> BL, IOR P/398/78, BJC 6 Dec. 1820, 5216, W. Chaplin to Gov., 27 Nov. 1820.

<sup>47</sup> The reason was not recorded.

natives conceive to result from the arrest of persons of rank'. The recorder was to be requested to consider 'some sort of process less irritating and repugnant to the feelings of the natives to guard against the danger of violating their prejudices'. The government's policy towards the sardars would be 'rendered nugatory by the process of a court regulated by the forms prescribed by the laws of England'.<sup>48</sup> The draft letter also referred to a case in which Chimnaji Appa was sued in the Recorder's Court for debt by 'a shopkeeper in Bombay'. Recorder Alexander Anstruther admitted that Chimnaji was amenable to the King's Court and could be arrested. The government warned that the most powerful sardars such as Chintaman Rao or Appa Desai could have been prosecuted and arrested 'in the midst of their own jageers, if the oppressed party repaired to Bombay and preferred his complaints to any of the practitioners in the King's Court'.<sup>49</sup>

At this stage, in 1820, the government chose not to provoke further conflict with the King's Court. The draft letter was not sent to Calcutta. The government referred Chaplin to the opinions of H. G. Macklin and R. Spankie, the late Advocates General at Bombay and Calcutta, who had stated that the writ of the King's Court ran through the whole presidency and that redress was only obtainable in the court. Chaplin did not accept the view and said that 'the late Advocate General must have taken an erroneous view of the court's power'.<sup>50</sup> This indicates that the government tried to retain regularity of judicial system by referring to the former decision of the supreme government in Calcutta. So, as in the cases of revenue which we saw in chapter 3, there

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<sup>48</sup> BL, IOR P/398/78, BJC 29 Nov. 1820, 5139–46, Draft letter to the Supreme Government, 24 Nov. 1820.

<sup>49</sup> Ibid.

<sup>50</sup> BL, IOR P/398/78, BJC 6 Dec. 1820, 5216 ff., W. Chaplin to Gov., 27 Nov. 1820.

was still a gap between the sense of crisis of district officers such as Chaplin and Pottinger and the inclination for regularity of those in the Bombay castle. But thereafter similar cases accumulated and the government's attitude was hardened.

The King's Court's interference was most apprehended in relation with the policing in the mofussil. The government's security anxiety was enhanced by its recognition that the King's Court might hinder the working of village police. In a letter to the Court of Directors in 1823, the government expressed its anxiety about whether the hereditary village officials vested with police authority were amenable to the jurisdiction of the King's Court. Advocate General Woodhouse admitted that although they were not amenable to the court merely because they were the landholders in charge of revenue collection; they would however be amenable if they exercise a magisterial power which was not connected with revenue. The government apprehended 'the inconvenience and distress public and private which must be occasioned if such parties should be summoned to the presidency'.<sup>51</sup> As we saw in Chapter 4, the patils were at the centre of Elphinstone's police system in the mofussil. Their allegiance to the government was vital in times of emergency, for they would follow the example of the patils in Kittur who ignored orders of the collector and cooperated with the insurgents.

However, the real danger came not from the villages but from the hills, or more precisely, from the connection between the two. The crisis of 1824 significantly heightened the government's security anxiety, and it became very sensitive to the problems of hill tribes. But the King's Court did not care about the distinction between the hills and the plains; its sovereign jurisdiction

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<sup>51</sup> BL, IOR L/PJ/3/917, 123, B JL, Gov. to CoD, 25 June 1823.

should cover all the territories and the peoples. Accordingly, Laxdir Dulput Rao III, the Muslim raja of Peinth in the Deccan Khandesh, was detained by the sheriff's peons under the process of the Supreme Court in 1825. The suit was instituted by a creditor for the raja's debt of Rs 9,000. The raja claimed that he did not borrow from him and never visited Bombay city.<sup>52</sup> The government was concerned about the tranquillity of the raja's estates, which were situated in thick forests and chiefly inhabited by the Kolis.<sup>53</sup> According to John Briggs, the Political Agent for Khandesh, he possessed 'considerable influence over the Bhils and Coolies'.<sup>54</sup> When he proceeded in the region in the Third Maratha War in 1818, the raja voluntarily cooperated with him by giving information and dispelling the hostile bands in the hill.<sup>55</sup> Naturally, Elphinstone could not admit the King's Court's interference in the affairs of this Koli chief from the perspective of security in the internal frontier.

The raja's political conducts were not favourably perceived by the government officials. The huge amount of debts incurred by the raja and the collection of giras contrary to the government's order were the two major problems. As to the debts, which were the immediate background of this case, the raja borrowed Rs 33,000 from a Surat savakar in 1824 to consolidate his debts to numerous creditors. It amounted to Rs 52,000 in 1827. He also owed Rs 12,000 to others, and the total debt was nearly Rs 65,000. Its annual

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<sup>52</sup> BL, IOR P/399/46, BJC 1 June 1825, no. 25, Raja of Peinth to W. S. Boyd, Assistant Collector of Ahmednagar, 15 May 1825; MSA, JD, 1825, 7/87, 219–20.

<sup>53</sup> Clunes, *Appendix*, 29.

<sup>54</sup> Avind M. Deshpande, *John Briggs in Maharashtra: A study of district administration under early British rule* (Delhi, 1987), 153, quoting Deccan Commissioner's Files, 170, J. Briggs to M. Elphinstone, 13 May 1818.

<sup>55</sup> The raja's state was under the agency of Ahmednagar Collector through his assistant collector at Nasik since 1822. *Selections from the records of the Bombay government* [hereafter SRBG], new series, 26 (Bombay, 1856), 112, 134, H. E. Goldsmid, report, 21 Sep. 1839.

demand far exceeded the revenue of the country. As a result, the country was said to be totally sunk under the control of the savakar and his vakeel.<sup>56</sup>

Because of this, the district officials were critical of the raja. William S. Boyd, the second assistant collector at Nasik, reported the incident and expressed his worry about the evil of the apprehension of persons of rank outside the jurisdiction of the King's Court.<sup>57</sup>

Boyd was also concerned about the raja's collection of giras, which had been prohibited since 1823.<sup>58</sup> He explained that the raja repeatedly promised to give up villages which he had no right to dispose of, but continued to collect revenue from villages contrary to the contract. This was detrimental to the confidence of ryots and harmful to the revenue collection. The improvement of the situation could not be expected as he was an 'unprincipled, debauched, ignorant man'. So the government should pay the debt with interest and temporarily resume the country. The tranquillity of the country and its neighbouring districts would be secured by the government's direct rule. The limited mortgage would be the most certain and least embarrassing measure for the government, which enabled it to be 'unentangled' with the affairs other than to guarantee the savakar's agreement, without which no one would transact with the raja.<sup>59</sup> Collector Dunlop and Deccan Commissioner Chaplin endorsed this view.

But Elphinstone and the government's law officers were determined to protect the raja from the encroachment of the King's Court. The Company's

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<sup>56</sup> BL, IOR P/399/49, BJC 12 Oct. 1825, no. 16, W. S. Boyd to J. A. Dunlop, 30 June 1825; MSA, JD, 1825, 7/87, 301–19.

<sup>57</sup> BL, IOR P/399/46, BJC 6 June 1825, no. 1, W. S. Boyd to J. A. Dunlop, Collector of Ahmednagar, 15 May 1825; MSA, JD, 1825, 7/87, 228–9.

<sup>58</sup> SRBG, ns, 26, 134–5, H. E. Goldsmid, report, 21 Sep. 1839.

<sup>59</sup> BL, IOR P/399/49, BJC 12 Oct. 1825, no. 16, J. A. Dunlop to W. Chaplin, 20 Sep. 1825.

Solicitor E.C. Morgan explained that the arrest was irregular because the raja was an ‘independent sovereign prince’ who was not amenable to the Supreme Court. He applied to the Supreme Court to set aside the case, but the application was declined. He advised that the jurisdiction had to be contested in the court and the plaintiff should be prosecuted for perjury.<sup>60</sup> Advocate General Norton described the raja’s arrest as ‘one of the greatest outrages and abuses of the process of the Court’. He predicted that further abuse of the Supreme Court would happen, as he thought that the perjury was done with ‘effrontery’ and ‘a sense of impunity’ to do so. He recommended public prosecution of the culprits to prevent further evils.<sup>61</sup> Elphinstone said that it was urgently necessary to deal with the problem of jurisdiction because if the plaintiff should succeed in his plot in the King’s Court, it would induce other creditors of other princes to resort to the same method.<sup>62</sup>

Elphinstone’s deep concern was based on his belief that the raja’s presence was essential to keep the tranquillity of his hilly territory. After perusing the original sunnuds of the raja and related documents, he expressed his urgent sense of danger:

He [Raja of Peinth] seems indeed to be pretty nearly on the same footing that the Dessae of Kittoor was—His country was restored to him in a great measure on account of the molestation we were likely to experience should we attempt to retain it, and the quiet of the Bheels and Coolies in the neighbourhood seems to depend in a great measure on him anything that might provoke him to rebel is therefore of serious

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<sup>60</sup> BL, IOR P/399/46, BJC 22 June 1825, no. 10, W. A. Morgan to Gov., 4 June 1825, ‘*Vasy Kunthurbhoie Rambhae v. Lucksheedhun Dulputrowe*’, Affidavit of plaintiff’s son, Hindu merchant of Bombay, 6 Apr. 1825; MSA, JD, 1825, 7/87, 233–8.

<sup>61</sup> BL, IOR P/399/47, BJC 6 July 1825, no. 39, G. Norton to Gov., 30 June 1825; MSA, JD, 1825, 7/87, 289–91.

<sup>62</sup> BL, IOR P/399/49, BJC 12 Oct. 1825, no. 17, Gov. to W. Chaplin, 7 Oct. 1825; MSA, JD, 1825, 7/87, 323.



consequence and I think every means should be taken by application to the Court and by prosecuting the sheriff to obtain the immediate relief of the Raja and the punishment of those whose perjury was procured this proceeding against them.<sup>63</sup>

Elphinstone urged that the raja's right of exemption from the jurisdiction should be proved in the King's Court, because if 'a sovereign prince tributary but not feudatory to the Paishwa' could not be protected, 'there will be no safety for our numerous subordinate chiefs'; but, on the other hand, if there were not good hopes, the proceedings should be dropped, as 'a failure might ultimately be serious even in a political point of view'.<sup>64</sup>

The prospect for the government was not promising, though. The Company's Solicitor (E. C. Morgan) collected information to sue the sheriff, bailiffs, the plaintiff and his son. But it was discovered that the sheriff and his officers only followed the ordinary process of law, and the plaintiff was not aware of his son's conduct.<sup>65</sup> Receiving the information, Norton explained that the only remaining option was to prove the son's perjury by the testimony of the raja himself in the Supreme Court.<sup>66</sup> But the government could not call for the 'sovereign prince' to attend to the court. Eventually, the government decided to drop all further proceedings.<sup>67</sup>

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<sup>63</sup> BL, IOR P/399/46, BJC 22 June 1825, no. 15, M. Elphinstone, minute, n.d.; MSA, JD, 1825, 7/87, 287–8. Indeed, as it was troublesome for the government, when the raja died in 1839 without a male heir, it admitted the succession of his daughter 'as a matter of expediency'. BL, IOR F/4/1865/79212, 1B, BPL, Gov. to CoD, 26 Sep. 1840.

<sup>64</sup> BL, IOR P/399/55, BJC 25 Jan. 1826, no. 28, M. Elphinstone, n.d.; MSA, JD, 1826, 7/108, 156.

<sup>65</sup> BL, IOR P/399/63, BJC 16 Aug. 1826, no. 13, Edward Cobb Morgan to G. Norton, 27 July 1826. Edward succeeded his brother William as the Company's Solicitor in 1826.

<sup>66</sup> Ibid., no. 14, G. Norton to Gov., 1 Aug. 1826; MSA, JD, 1826, 7/108, 237–40.

<sup>67</sup> BL, IOR P/399/63, BJC 16 Aug. 1826, no. 15, Gov. to G. Norton, 11 Aug. 1826.

In this case, the district officials in the mofussil and the governor in council in Bombay sought different solutions. The former thought that the temporary resumption of the Peinth estates was necessary, while the latter stuck to the principle of indirect rule. This difference originated in their different priorities, which I have already pointed out in Chapter 3. The district officials' response was more local and individual, depending on the nature of each case. On the other hand, the government was more concerned about the regularity and principle of governance which would influence the other sardars' liability to the King's Court in future. But, despite the difference of preferred solutions, the government officials in the mofussil and in Bombay unanimously agreed that the problem should be settled by the government, not by the King's Court.

More importantly, this case revealed the inability of the government to resist the process of the King's Court in the arena of law. As we saw above, the government had kept its conciliatory attitude towards the King's Court in the case of Ramchunder Chowdry in 1820. By the late 1820s, after the crucial revolts in 1824 as well as the accumulation of similar cases, the government's attitude was hardened. In this 1827 case, the government was fully determined to fight to deny the King's Court's jurisdiction. But it could not do so. The government could devise measures to prevent the Company's Court's political interference, such as Regulations XV and XXIX of 1827 or the Agent for Sirdars in the Deccan. Indeed, the raja's name was entered in the lists of the first class sardars in 1828.<sup>68</sup> But the order of the King's Court was outside the jurisdiction of the government. The government officials' aspiration for institutional/legislative solutions was heightened by this and other similar cases.

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<sup>68</sup> SRBG, ns, 26, 135, H. E. Goldsmid, report, 21 Sep. 1839.

### III. Independent princes and the King's Court

As we have seen, the government's concern about the respectability of the sardars in charge of policing in the mofussil, especially in the hill regions, was the main factor which provoked the government's strong reaction against the King's Court. But the King's Court's political problem was not confined to the sardars in British India. The government worried about the King's Court's relationship with the foreign or independent princes in Indian India, as these chiefs started to show their intention to 'appeal' to the King's Court to defy their political engagements with the government. In other words, the chiefs started to treat the King's Court as an independent political authority separate from the government. This new dimension of the use of the King's Court pushed the government's sense of crisis to the limit.<sup>69</sup>

The cases in point were the independent chiefs of Kolhapur, Satara and Baroda. The structure of problem was similar in all three cases. What was disputed by the chiefs was the British government's interference in their internal affairs, particularly in their relationship with their subordinate sardars. The government's intervention was based on its conviction that, in order to deal with the critical situation in the mofussil, the foreign princes should apply the same policy of conciliation towards their sardars as the government did in British India. In all three cases, the government was concerned about

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<sup>69</sup> Indian India was outside the jurisdiction of the King's Court, and though there were some cases in which its writ was issued to the territories, it seems that they did not cause serious problems. See MSA, JD, 1826, 25/126, 283–6 and MSA, GD, 1827, 20/153, 119–58 (ms149–188) for examples from Cutch. In these cases, the governor provided a legal agent to represent 'any sovereign prince or an independent chieftain, whether residing within the British territories or elsewhere' in any courts of law in civil cases. Reg. III of 1827, s. 3, c. 2.

the princes' oppression against or inability to control their subordinate sardars and tried to uphold the sardars' sovereignty in their territories. In this sense, the government dealt with the sardars in foreign territories in the same way as those in British India. This was because the troubles caused by the wild tribes could easily 'infest' the British territories. As Radhika Singha suggests, the strengthening of the British policing towards the forest tribes drove out the thugs to the native states.<sup>70</sup> In order to deal with the raids of these tribes, the same policy should be taken by the independent chiefs. The Bombay government demanded the independent chiefs to be more vigilant to suppress these raiders, and when they failed, the government interfered in their affairs.

The princes' resort to the King's Court had a grave political implication, as it meant that the princes tried to establish an alternative means of political negotiation which bypassed the Residents sent by the government. As Michael Fisher shows, maintaining independent means of communication was essentially important for the Indian rulers to uphold their political authority, and while the British government imposed the Resident as the sole agent of communication, they tried to evade it by directly sending letters to the Resident's superiors, such as governors, governor generals or the king in England.<sup>71</sup> So the princes' effort to appeal to the King's Court was a customary political recognition that the King's Court was superior to the government.

If 1824 was the first major year of crisis, 1827 was the second. At the centre of this crisis was the problem of relationship between the Ramusi raiders led by Umaji Naik and the independent chiefs of Satara and Kolhapur. Both Satara

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<sup>70</sup> Singha, *Despotism of law*, 201.

<sup>71</sup> Fisher, *Indirect rule*, 272–82.

and Kolhapur were the direct descendants of Sivaji Bhonsle, the founder of the Maratha confederacy, and both were protected states of the British government supervised by its Political Residents. In the case of Kolhapur, the raja directly entered the alliance with the raiders to resist the government. In the case of Satara, containing the largest number of Ramusis in the Deccan,<sup>72</sup> the government apprehended the raja's inefficiency in policing the raiders in his territory and demanded more vigilance. Both chiefs were discontented with the British interference and tried to use the King's Court as a tool of negotiation and resistance.

The raja of Kolhapur's resistance to the British most clearly exhibited the old structure of politics based on the connection between the plains sardars and the hill tribes. The new raja Baba Sahib, who started his reign in 1821, was particularly notorious for his bad character. After the succession, he considerably increased the army, resumed his conflict with the neighbouring Patwardhans, and plundered the territories of his feudatory jagirdars, the chiefs of Kagal and Ichalkaranji.<sup>73</sup> The raja's government was based on his coalition with freebooters. His state sometimes became a refuge to the raiders, and his favourite servant, one Subhana Nikam, was the head of highway robbers. The raja even raided his own treasury to get possession of the state jewel.<sup>74</sup> As we saw in the last chapter, the Kittur rebels approached the raja in 1824. For Elphinstone, 'the Raja of Colapore is a great plague'.<sup>75</sup>

Deeply concerned about these situations, the government sent its army

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<sup>72</sup> Alexander Mackintosh, *An account of the origin and present condition of the tribe of Ramoossies, including the life of the chief Oomiah Naik* (Bombay, 1833), 6.

<sup>73</sup> *Kolhapur gazetteer*, 238; Wilson, *History*, iii. 175–6.

<sup>74</sup> *Kolhapur gazetteer*, 238; West, *Southern Maratha Country*, 16.

<sup>75</sup> M. Elphinstone to C. T. Metcalfe, 1825, quoted in R. D. Choksey, *Mountstuart Elphinstone: The Indian years 1796–1827* (Bombay, 1971), 304.

to Kolhapur in 1825 and concluded a treaty with the raja in January 1826.<sup>76</sup>

The treaty, while admitting ‘the independence of the said Rajah as a sovereign prince’, bound him to be advised by the British government on all security matters, to reduce his force, and not to raise a force to endanger the tranquillity ‘within or without his territories’. The points were the protection of sardars and the suppression of raiders. The raja was obliged not to molest his subordinate jagirdars and to pay compensations for those who were injured by him. The government also guaranteed the land and rights of the sardars. The raja should not grant asylum to the enemies or rebels of the British and was obliged to suppress and arrest raiders who plundered the British territories. If he failed to do so, the British government was to send the army or police to arrest the raiders in his territory.<sup>77</sup>

The raja was dissatisfied with this measure. He soon resumed his resistance, and this time, he relied on the authority of King’s Court. The detail was explained in Elphinstone’s minute on his final tour in the Deccan. The raja first applied a passport for pilgrimage to Jejuri, famous for its temples and its Ramusi bands.<sup>78</sup> Elphinstone discouraged but eventually admitted it. After Jejuri, the raja visited Poona to see Elphinstone and revealed his real intention. He wanted to annul the late treaty and demanded that the government allow him freely to extract taxes in his territory. Elphinstone explained the futility of these demands, but the raja was adamant. Then, Elphinstone was confidentially exposed by his vakeels that the raja was intending to resort to the Supreme Court. Elphinstone explained to them that

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<sup>76</sup> *Kolhapur gazetteer*, 239–40.

<sup>77</sup> BL, IOR F/4/1071/29239, Bombay Secret Consultations [hereafter BSC], 12 Oct. 1826, nos. 1–6, M. Elphinstone, minute, n.d; Aitchison, *Treaties, engagements and sanads*, viii. 227–9.

<sup>78</sup> Mackintosh, *Ramoossies*, passim.

their exposure was meaningless, because going to the Supreme Court could have no effect. The vakeels expressed their fear that their exposure would come to the raja's ears, but Elphinstone suspected that they were sent by the raja to ascertain his attitude on this issue.<sup>79</sup>

Soon after this attempt, in September 1827, it was revealed that the raja of Kolhapur allied with the Ramusi chief Umaji Naik and planned a rebellion of a much larger scale. In the plan, while the raja defended his country from British encroachment, the Ramusis were to strike Poona or harass the government army until favourable terms were extracted. The Ramusis started to levy contributions from villages, often with connivance with the patils.<sup>80</sup> Elphinstone cautioned the Kolhapur's mobilisation of 'a predatory army', and he ordered to attack the raja in advance in order to prevent it.<sup>81</sup> Eventually, the British troops were sent to Kolhapur, and the second treaty was concluded in October 1827. By the treaty, the government had to seize a direct control of Akewat, 'a notorious haunt of robbers'. But even after that, the raja repeatedly disturbed the public tranquillity, the British troops were sent again, and the third and definitive treaty was concluded in 1829.<sup>82</sup>

Contrary to the Kolhapur raja, the Satara raja had acquired a favourable reputation among the government circle including Elphinstone.<sup>83</sup> But the government was not satisfied with the raja's policing of the tribal raiders in

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<sup>79</sup> BL, IOR F/4/1148/30306, 6–16, M. Elphinstone, minute, 4 Jan. 1827.

<sup>80</sup> Mackintosh, *Ramoossies*, 140.

<sup>81</sup> *Raja Pratapsinh of Satara 1818–1839: Select documents from the Satara residency papers, peshwa dafter, Poona, and the Elphinstone papers*, India Office Library, London [hereafter *Pratapsinh*], ed. R. D. Choksey (Poona, 1970), 159, Gov. to Hyderabad Resident, 7 Sep. 1827.

<sup>82</sup> *Kolhapur gazetteer*, 238–40; Aitchison, *Treaties, engagements and sanads*, viii. 229–34.

<sup>83</sup> Sumitra Kulkarni, *The Satara raj (1818–1848): A study in history, administration and culture* (New Delhi, 1995), 21.

his territories. The suppression of the raiders in Satara was vital for the government. This was not only because the country contained the largest number of the Ramusis in the region, but also because the raiders sold the goods plundered in the British territories to Satara's local merchants.<sup>84</sup> Elphinstone had articulated that Satara should be governed on the same principles as those prescribed for the conquered territories in the Deccan.<sup>85</sup> By the treaty with the raja in 1819, the Bombay government guaranteed the possessions of jagirdars in Satara.<sup>86</sup> But, for example, the policing in the territory of Pant Sachiv was 'scandalous': he seized robbers only to extract booty and release them in his fort, so the territory became a favourable retreat of the robbers after they plundered the Company's districts.<sup>87</sup> His status as the descendant of Sivaji was easily used to legitimatise the raids. In the crisis year of 1824, a Bhil leader Godaji Danglia in Baglana, a relative of the notorious Trimbuk, called for rebellion against the government, pretending to act under the name of the raja of Satara.<sup>88</sup>

The raja, on his part, was discontented with the interference of the British government in his relationship with the sardars. Resident Briggs commented that the raja evinced his 'jealousy' towards the British interference and disliked their protection of his jagirdars. But the government interfered in the succession issue of Nimbalkar Naik of Phultun, whose territory was a hub of gang raiders,<sup>89</sup> and criticised the raja's dealing with his heavily indebted sardar Ram Row Duffle, which was jeopardising 'the

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<sup>84</sup> Mackintosh, *Ramoossies*, 37.

<sup>85</sup> *Pratapsinh*, ed. Choksey, 28, M. Elphinstone to J. Grant, 18 Apr. 1818.

<sup>86</sup> Aitchison, *Treaties, engagements and sanads*, viii. 392, article 7. *Pratapsinh*, ed. Choksey, 8.

<sup>87</sup> *Pratapsinh*, ed. Choksey, 126, J. Briggs to Gov., 1 Jan. 1827. See also, *Pratapsinh*, ed. Choksey, 82, J. Grant to W. Chaplin, 1 Sep. 1820.

<sup>88</sup> Wilson, *History*, iii. 168–79.

<sup>89</sup> *Pratapsinh*, ed. Choksey, 132–3, J. Briggs to Gov., 1 Jan. 1827.



tranquillity and prosperity of the Duffle districts, and, particularly the administration of justice and police matter'.<sup>90</sup>

The discontent over these conflicts led the raja to write a series of letters to other independent chiefs and sardars, which was contrary to the 'fundamental condition' of his treaty with the British that the raja should 'forbear all intercourse with foreign powers, and with all sirdars, jaghiredars, chiefs and ministers' who were not under his authority.<sup>91</sup> In 1826 the Political Resident reported that the raja 'rather too publicly' resented the presence of the Political Resident and envied the independent status of the raja of Kolhapur.<sup>92</sup> Soon after this, William Simson, the Acting Political Resident, reported that the raja had several secret contacts with Kolhapur and planned to reinforce the fort Serala [Shirala] at their border.<sup>93</sup> It was rumoured that he would receive the fealty of the Patwardhans and other sardars. 'He is ... extremely tenacious of his prerogative and will every day more and more resent out control', concluded Briggs.<sup>94</sup> Indeed, there was a large-scale plot going on. The raja concluded a treaty with the Portuguese Viceroy of Goa in 1826, under which he would pay money to the Portuguese to regain the former Maratha territories.<sup>95</sup> In January 1827, it was reported that the raja plotted with Kolhapur, Appa Desai of Nipani, Ichalkaranji, Patwardhan, and the Swamee of Sunkeshwur. The Nizam of Hyderabad, the French, the Portuguese, Sindhia, Appa Sahib of Nagpur, the Gaekwad of Baroda and the Pindaris

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<sup>90</sup> *Pratapsinh*, ed. Choksey, 157, W. Simson to Gov., 16 Apr. 1827; see also *Pratapsinh*, ed. Choksey, 127–8, J. Briggs to Gov., 1 Jan. 1827.

<sup>91</sup> Aitchison, *Treaties, engagements and sanads*, viii. 391–2, article 5 of the 1819 treaty.

<sup>92</sup> *Pratapsinh*, ed. Choksey, 112–5, John Briggs to M. Elphinstone, confidential, 8 Oct. 1826.

<sup>93</sup> *Pratapsinh*, ed. Choksey, 116–7, W. Simson to H. Baber, Political Agent of Southern Maratha Country, 3 Dec. 1826.

<sup>94</sup> *Pratapsinh*, ed. Choksey, 132–3, J. Briggs to Gov., 1 Jan. 1827.

<sup>95</sup> *Sattara gazetteer*, 309–11.

would be invited to it.<sup>96</sup>

It was in this context of intrigue that the raja approached the King's Court. It was reported that the raja was 'very anxious to come to Bombay' and to meet the chief justice, though he did not show such eagerness to meet the British Commander in Chief or any other members of the governor's council. Malcolm, who succeeded the precarious situation as the governor in 1828, had to have a prolonged correspondence with the raja on this matter. He argued that the purpose of the raja was jurisdictional jockeying:

This may arise from two motives, dread of the ill understood and magnified power of the Supreme Court, or more probably from an impression that there are two parties in our administration, and that it may be useful on a notion of the good terms he is with the one, to propitiate the other. This last ground of action is the most probable, as it is suited to the limited knowledge on such points of this Prince, and that prevention and cautious policy bordering on intrigue which belongs to him in common with almost all of his class.<sup>97</sup>

This time the meeting seemed not to be realised, but Malcolm's belief in the mischievous influence of the King's Court over the discontented chiefs was strengthened. Malcolm further discovered in 1830 that the raja of Satara in turn was annoyed by his jagirdar Akulcote, who instigated a rebellion against the raja by pretending the name of government and the King's Court. The use of the name of the King's Court in politics and diplomacy became fairly common by this time.<sup>98</sup>

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<sup>96</sup> *Pratapsinh*, ed. Choksey, 137–9, William Simson to M. Elphinstone, 27 Jan. 1827; *Pratapsinh*, ed. Choksey, 140–9, W. Newnham to Gov., 26 Feb. 1827.

<sup>97</sup> BL, IOR L/PJ/3/918, 55–8, BJL, Gov. to CoD, 27 Sep. 1828, BJC 27 Sep. 1828, J. Malcolm to Thomas Bradford, 18 July 1828.

<sup>98</sup> BL, IOR H/734, 867–74, J. Malcolm to Lionel Smith, 16 Jan. 1830. The raja's conspiracy itself continued. His attitude hardened through the 1830s, and when another plot was exposed in 1839, he was deposed. *Satara gazetteer*,

The cases of Kolhapur and Satara indicated that the King's Court's jurisdiction in the mofussil had started to assume a more direct political importance. Both chiefs tried to use the court as a means of negotiation with the British government. The King's Court was recognised more as an independent political sovereign than a branch of the British government. This sense of crisis reached its apex in early 1828, when another, far greater threat was posed by the use of the King's Court by Sayaji Rao II, the Gaekwad of Baroda. Baroda was the powerful successor state of the Mughal empire in Gujarat and in a subsidiary alliance with the British since the Second Maratha War. The chief concern of the government was again related to the suppression of raids by the wild tribes. The Gaekwad's role was crucial in this respect, because as the overlord he had the right to receive tributes from many girasia and mehwasī chiefs. As we saw in the previous chapter, the raids by these chiefs were the main concern of the government which led to the legislation of Regulation XV of 1827 vesting the sardars with police authority. The tranquillity of Baroda was also vital from a commercial perspective, as it cut across the significant route of the opium passage from Malwa to the west coast.<sup>99</sup>

The government had already taken some measures which were directly aimed at eliminating the raids in this region. First the government concluded a treaty with the Gaekwad in 1820 which ordered that he should not send his troops to the sardars in Kathiawar and Mahi Kanta for the purpose of collecting tribute from them.<sup>100</sup> At the same time, the government also

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310–1. The detail of the case was printed as *Papers respecting the case of the raja of Sattara* (London, 1840).

<sup>99</sup> *Sayajirao II*, ed. Pandya, xii.

<sup>100</sup> Aitchison, *Treaties, engagements and sanads*, vi. 361.

deprived Baroda of the power of superintending its tributary chiefs and put them under its direct control.<sup>101</sup> But the raids by the girasia chiefs continued. By the late 1820s the government realised that the Gaekwad's irregular payment of the giras was the root cause of these raids.<sup>102</sup> In 1825, the collector of Khandesh proposed the transfer of the right of distributing giras from the Gaekwad to the Bombay government, 'since the burden and trouble of putting down any risings of such people must always in a great measure fall upon us'.<sup>103</sup> The Gaekwad resisted because it was the mark of his supremacy over the chiefs.<sup>104</sup> This situation was the background against which the government conceived the King's Court's evil effect on the security of the territory.

The immediate context of the Gaekwad's resort to the King's Court was Sayaji's large amount of debt to the local bankers amounting to over Rs 133 lakh in 1825, which were to be paid by yearly instalments of Rs 15 lakh. It was a serious concern of the government, because the government was involved in the bhandari or guarantee system under which it guaranteed the payment of Sayaji's debt to the local bankers. Malcolm said that it was 'a prominent feature of the government of the country' succeeded by the British.<sup>105</sup> From 1801 to 1827 the Bombay government concluded 119 bhandari contracts, of which 65 were redeemed and 54 were still in force.<sup>106</sup> In 1827, the Bombay government imposed upon Sayaji Rao the septennial bhandari settlement, a plan of farming out his district in septennial leases to

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<sup>101</sup> *Baroda gazetteer*, 328–37; *Sayajirao II*, ed. Pandya, 168–9, Baroda Resident to Gov., 30 Oct. 1821.

<sup>102</sup> Skaria, *Hybrid histories*, chapter 10.

<sup>103</sup> *Sayajirao II*, ed. Pandya, 202–3, J. Briggs to Gov., 30 July 1825.

<sup>104</sup> Skaria, *Hybrid histories*, 156.

<sup>105</sup> Malcolm, *Government of India*, 7.

<sup>106</sup> BL, IOR R/2/531/294, 404–9, BSC 19 Mar. 1828, no. 5, J. Malcolm, minute, 25 Jan. 1828.

the holders of the guaranteed loans. It was devised by John Pollard Willoughby, the Assistant Resident at Baroda, with the cooperation of Baroda's chief minister Wittul Row Dewanjee. As Fisher points out, the British government often appointed the chief minister to control the internal and external affairs of the Indian princes and provoked their resistance.<sup>107</sup> This was also true in this case of Baroda. Sayaji agreed with the scheme with great reluctance and repeatedly complained about it.<sup>108</sup> He sought loans from new bankers not under the guarantee of the British government and succeeded in borrowing Rs 7 lakh in January 1828.<sup>109</sup>

The enforcement of the Gaekwad's payment of debts guaranteed by the British was essential for the maintenance of British power and the tranquillity in this region. Before the arrival of the British, the guarantee was provided by the Arab sardars (or jamadars) commanding mercenaries. The bhandari was, as Malcolm recognised, a source of their strength and influence as was their military power.<sup>110</sup> When the government superseded the Arabs, it also 'deprived of the Guicowar Sirdars of a powerful means by which they derived a right of controlling their Government'.<sup>111</sup> So the guarantee of solvency of Sayaji's debts was essential for the government to maintain the tranquillity of the region by depriving Arabs and others of any political influence over the Gaekwad. Malcolm said that it was the arrangement 'which gave to the government the great advantage of settling without war the countries of Guzerat'.<sup>112</sup> In short, it was synonymous with the paramountcy of the British

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<sup>107</sup> Fisher, *Indirect rule*, 208–27.

<sup>108</sup> *Baroda gazetteer*, 239; Robert Wallace, *The Guicowar, and his relations with the British government* (Bombay, 1863), 325–76, 679–80.

<sup>109</sup> Mani Kamerkar, *British paramountcy: British-Baroda relations 1818–1848* (Bombay, 1980), 80.

<sup>110</sup> Malcolm, *Government of India*, 7.

<sup>111</sup> *Sayajirao II*, ed. Pandya, 32–4, Baroda Resident, memorandum, 1826.

<sup>112</sup> Malcolm, *Government of India*, 154, Malcolm, minute, n.d.

government.<sup>113</sup>

Malcolm disliked any cases in which the political authority of the Gaekwad was undermined by other actors' interventions. When the septennial contract was concluded, the Indian bankers recommended the government to resume the land and start its direct rule. Malcolm strongly reminded them that the government would never collude with them in such a machination against Sayaji Rao.<sup>114</sup> Apprehending such an unstable condition of the country, Malcolm instructed the Resident to prevent 'any intercourse with individuals that is likely in any way to hurt his feelings or excite his jealousy: you should, indeed, take every opportunity you can of disclaiming all right of interference with his internal affairs'.<sup>115</sup> The King's Court in the 1820s was the perfect candidate for this kind of interference.

Sayaji Rao threatened the government that if his demands were not realised, he would 'appeal' to the King's Court. He sent his notorious chief minister Veneram to Bombay to demand two things of the Bombay government. One was the reduction of the interest rate of public debts from 7.5 to 4.5 percent, and the other was the removal of internal interference by deposing the Political Resident and the chief minister Wittul Row.<sup>116</sup> The Resident reported that Sayaji expressed his intention that 'he will appeal to Bombay and to England', or 'if the governor will not attend to his wishes, he will appeal from government to the Supreme Court'.<sup>117</sup>

Malcolm expressed his strong antipathy towards 'a knot of natives at Bombay' who, for their profit, attempted to create a belief that the King's

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<sup>113</sup> cf. Kamerkar, *British paramountcy*, 108–9.

<sup>114</sup> BL, IOR R/2/531/294, 409, BSC 19 Mar. 1828, no. 5, J. Malcolm, minute, 25 Jan. 1828.

<sup>115</sup> Malcolm, *Government of India*, 12–6.

<sup>116</sup> BL, IOR R/2/531/294, 151, Baroda Resident, secret diary, 5 Feb. 1828.

<sup>117</sup> *Ibid.*, 149–51.

Court's jurisdiction extended beyond its limits, 'by working in the fears, the hopes, and the ignorance of those they delude with false expectations to their ruin'.<sup>118</sup> His sense of danger was strong:

I have no hesitation in stating it to be my deliberate opinion that as long as an impression exists that there is an authority vested in his Majesty's Court to check and control the exercise of political power by the civil government, it will operate beyond all other cases to disturb the country and destroy its remaining princes and chiefs.<sup>119</sup>

The event was conceived to be an emergency: Malcolm ordered the reinforcement of troops in Baroda.<sup>120</sup>

The attempt of Sayaji Rao and Veneram was supported by their agents in Bombay. Veneram was said to have received bills drawn by Sayaji personally and jewels of value Rs 5 lakh to take with him to Bombay. He landed at Bassein and communicated with one Munmooindas in Bombay.<sup>121</sup> Besides, what is particularly interesting for our study is that he visited Cursetjee Manockjee and Amerchund Bedreechund, the two Bombay merchants discussed in Chapter 2, for advice.<sup>122</sup> Though Veneram's request was declined by both of them, his attempt suggests that the information of the suits of the Bombay merchants was widely known among the chiefs and sardars. As we saw in the last chapter, Malcolm worried about the sardars' coming to Bombay or sending their vakeel there to contact the Agent for

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<sup>118</sup> BL, IOR L/PJ/3/918, 55–8, B JL, Gov. to CoD, 27 Sep. 1828, enclosing BJC 27 Sep. 1828, J. Malcolm to T. Bradford, 18 July 1828.

<sup>119</sup> BL, IOR P/SEC/BOM/66, BSC 27 Feb. 1828, no. 5, 193–8, J. Malcolm, minute, 25 Feb. 1828.

<sup>120</sup> BL, IOR R/2/531/294, BSC 5 Mar. 1828, no. 7, 223–4, J. Malcolm, minute, 26 Feb. 1828.

<sup>121</sup> BL, IOR R/2/531/294, 359–66, James Williams to Gov., n.d.

<sup>122</sup> BL, IOR R/2/531/294, 619–22, BSC 26 Mar. 1828, no. 2, J. P. Willoughby to Gov., 22 Mar. 1828.

Sirdars. The case of Baroda indicates that Malcolm's attempt to restrain it by establishing the Deputy Agent for Sirdars was annulled by the presence of the King's Court.

Veneram's Bombay mission heightened the tensions in Baroda. The Political Resident James Williams reported that the peasants in Baroda were instigated to prepare complaints against the kamavisdars of the parganas leased under the septennial loan and, when Veneram returned, to deliver their petitions to the governor.<sup>123</sup> The bankers who were affiliated with the bhandari of the British government were also alarmed. The false information of Veneram's success was disseminated, and the intimidated bankers issued a public declaration that they would acquiesce to Sayaji Rao.<sup>124</sup> Malcolm advocated the need for strong intervention to preserve the existing system of bhandari.<sup>125</sup>

Eventually, Veneram's mission to the King's Court failed. But even after that, Sayaji denied the fulfilment of his payment of debt. Malcolm was now convinced that the 'System of non-interference then is wholly incompatible with the redemption of a pecuniary obligation where the disposition of the sovereign is sordid ...'.<sup>126</sup> He sequestered the Gaekwad's territories yielding Rs 10,00,000 and leased them to the guaranteed bankers. Wittal Row was nominated in charge of his former lands. Malcolm later vindicated the intervention as the act of political emergency:

This nomination of Wittal Row to the charge of the districts in Guzerat and Kattywar was no doubt most offensive to the feelings and pride of

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<sup>123</sup> BL, IOR R/2/531/294, 359–66, J. Williams to Gov, n.d.

<sup>124</sup> BL, IOR R/2/531/294, 409–10, BSC 19 Mar. 1828, no. 5, J. Malcolm, minute, 25 Jan. 1828.

<sup>125</sup> Ibid., 413, 427, 429.

<sup>126</sup> Ibid., 401.



Syajee; but the case was one of emergency; it was produced by his faithlessness; there was no alternative; and the success of the arrangement superseded all other considerations.<sup>127</sup>

The sequestration was completed without any disturbance, except that Sayaji complained against the measure, issued a counter proclamation ('a manufacture of Bombay, and meant for the London market', said Malcolm), placarded it at Baroda and over his territories, and sent it to Calcutta and Benares.<sup>128</sup> The liquidation of debts was completed and the land was returned in 1832, while the ten lakh remained deposited to the Company.<sup>129</sup>

#### IV. Conclusion

As we saw in Chapter 4, the government intended to subject the affairs of the sardars and the independent chiefs only to the political authority and exempted them from the Company's judiciary. The cases of the sardars in British India show that the King's Court's writ nullified this policy. The government could not control the process of the King's Court in the mofussil. By taking cognizance of the cases of sardars, the King's Court exercised the sovereign power to determine the fate of the sardars against whom an action of law was brought about. This inability to monopolise the political power to decide the affairs of the sardars was at the core of the government's anxiety of sovereignty in the mofussil.

The cases examined here show that the government's logic of

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<sup>127</sup> Malcolm, *Government of India*, 23.

<sup>128</sup> *The correspondence of Lord William Cavendish Bentinck, Governor-General of India 1828-1835*, ed. C. H. Philips, 2 vols. (Oxford, 1977), i. 35, J. Malcolm to C. Williams-Wynn, 24 May 1828.

<sup>129</sup> Aitchison, *Treaties, engagements and sanads*, vi. 364.

emergency and the King's Court's logic of law were based on different notions of time, space, and boundary in the mofussil. The government had to deal with the fact that the raiders easily transcended the boundaries between British and Indian India even in times of peace. Because of this, the officials' notions of time and space were characterised by gradation and continuity. The security issues at the time of conquest persisted in times of peace, and there were no boundaries between internal and external frontiers. In consequence, India was always in a state of emergency. The realm of politics should be retained after the post-war settlement. On the other hand, the King's Court assumed a sharp discontinuity before and after the conquest. Once a territory was conquered, it became part of British India, and the British law could be applied in the territory. In this sense, the King's Court exhibited a rigid notion of territoriality. For the judges, there were no internal frontiers in British India, while the boundaries between British Indian and Indian India were essential in demarcating the inside and outside of its jurisdiction. In other words, territory, sovereignty, and jurisdiction were identical for the judges; all of them signified the state of civil society presided over by regular courts of law. This was simply unrealistic and unacceptable for the government.

The accumulation of cases of the King's Court's intervention in the revenue affairs, which we saw in Chapter 3, and those of sardars and independent chiefs discussed in Chapters 4 and 5 showed an alarming tendency of the King's Court's exertion of sovereignty in the mofussil. This anxiety of sovereignty culminated in late 1828, immediately after the failure of the Baroda mission to Bombay, in two legal cases relating to the King's Court's prerogative writ of habeas corpus. The next chapter discusses the cases in detail.

## Chapter 6: Habeas corpus, ‘state policy’, and native aristocracy

### I. Introduction

As Rajnarayan Chandavarkar points out regarding the Bombay city police in the late nineteenth-century, ‘[p]aranoia was the hallmark of the colonial imagination’.<sup>1</sup> Nothing showed this more clearly than the government of John Malcolm in its conflict with the King’s Court in the late 1820s. The developments depicted in previous chapters converged and exploded in two cases of habeas corpus in 1828. In the first case, the King’s Court issued the writ to a second class sardar in Poona. In the second case, it was issued to release a revenue defaulter in the gaol. The government overtly intervened in the processes of the King’s Court, and the judges strongly reacted to it. Every aspect discussed in previous chapters—judicial check of the government officers, revenue collection and revenue debts, use and abuse of the civil litigation, and the policing of tribes and the rebellions of princes in the mofussil—was disputed by the government and the court.

Little scholarly attention has been paid to the cases,<sup>2</sup> but they were the single most important political issue of the Bombay government in the late 1820s. The Political Department of the Bombay government sent 59 letters

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<sup>1</sup> Rajnarayan Chandavarkar, *Imperial power and popular politics: Class, resistance and the state in India c. 1850–1950* (Cambridge, 1998), 195.

<sup>2</sup> O. P. Bhatnagar, M. P. Jain, and A. G. Noorani outline the cases. Jain, *Outlines*, 105–6; O. P. Bhatnagar, ‘The case of Moro Raghunath: A case illustrating the conflict between judiciary and executive in India in early nineteenth century’, Allahabad High Court (<http://www.allahabadhighcourt.in/event/TheCaseofMoroRaghunathOPBhatnagar.pdf>, accessed 3 May 2016); A. G. Noorani, *Indian Political Trials 1775–1947* (Oxford, 2005), 10–17. Cf. Wilson, *Domination*, 147. The exception is Jon Wilson, *India conquered: Britain’s raj and the passions of empire* (London, 2016, forthcoming).

relating to these cases to the Court of Directors in 1828 and 1829, while only 5 letters were related to other topics. The enclosures amounted to 3,000 pages, contained in three dedicated volumes in the India Office Records.<sup>3</sup> Governor Malcolm remarked that ‘if there had not been shedding of blood in this war, there had been shedding of ink in abundance’.<sup>4</sup> During the event, the Bombay government constantly sought support from the home authorities and maintained dense public and private communication with the other governments of Bengal and Madras.<sup>5</sup> The King’s Court also sent petitions and letters to authorities in India and in London. The fact that the two cases were disputed in the imperial arena gave them a lasting importance in shaping the future form of imperial governance in India.

The King’s Court and the Bombay government both fully developed their logics of law and state necessity in the cases, each of which was strengthened by the other. The government’s chief concern was that the King’s Court’s exercise of jurisdiction undermined the authority of the government, because the Indians were unable to understand the division of power in the British constitution and simply assumed that the British were fighting with each other.<sup>6</sup> The government ordered the court to stop its proceedings as they were the cases of ‘state policy’. The judges of the Supreme Court rebutted that

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<sup>3</sup> BL, IOR L/PS/6/179–81. Corresponding volumes in the Board’s Collection are F/4/1030/28288–28289, F/4/1113/29753A, F/4/1114/29753B–C. In this chapter, I use these compilations instead of Proceedings and Consultations in IOR/P. The corresponding volumes in the Maharashtra State Archives are MSA, PD, 1829/30, 23/347 and 24/348.

<sup>4</sup> BL, IOR H/734, 529–30, John Malcolm to S. R. Lushington, governor of Madras, 21 Oct. 1828.

<sup>5</sup> BL, IOR L/PS/6/180, 339–482, BPL, Gov. to CoD, 9 Feb. 1829.

<sup>6</sup> Malcolm once said to Wynn that ‘if it is good that his Majesty’s judges should have more extended authority, let it be openly and decidedly granted. It will be understood: which will in some degree take from the evils that result from the undefined nature of the present powers of the court’. *Bentinck Correspondence*, i. 36, J. Malcolm to C. Williams Wynn, 24 May 1828.

it was not the government but the King's Court that should decide whether they were such cases or not. The King's Court's reaction inevitably induced the government to take a more extreme position. Its language of governance and law became more crisis-driven and emergency-oriented than before.

The Moro Ragonath case jeopardised the Bombay government's central policy of preserving the native aristocracy, which was, as we saw in previous chapters, given the primary importance as the agent to deal with the tribal raids in the newly conquered territories. Governor Malcolm was equally concerned about the fate of sardars as his predecessor Elphinstone was.

Malcolm's model of government was what he called the subah government. In regard to Malwa and Rajputana in central India, he explained it as follows:

My object ... is ... to establish a subah government which in the principles and forms of its administration, should be so constructed as to admit of the co-existence of a native aristocracy with our rule: and to do this, I was satisfied it was indispensable to keep both our regular courts of *adalat* and his Majesty's courts of justice at a distance.<sup>7</sup>

In this way, Malcolm clearly stated that the judiciary—both the Company's and the King's—had nothing to do with its governance in the newly acquired territories. The sardars and refractory chiefs were to be totally exempted from the application of regulations in the court of law and to be put under the exclusive control of the commissioner who combined executive, judicial and police powers.

The high priority put by Malcolm on the issue of the native aristocracy

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<sup>7</sup> *Bentinck Correspondence*, ed. Philips, i. 55, J. Malcolm to W. Bentinck, 27 July 1828. On the other hand, warned Malcolm, if both the powers of the *adalat* and the King's Court were not speedily restricted, 'their power will soon embrace all India, and be, in my opinion, when so spread, a sufficient cause of the downfall of this empire'. *Ibid.*

was indicated in his controversy with the Bengal government on the importance of maintaining nuzzerana, or an inheritance tax paid by the subordinate to their superior. It was disputed in relation with the resumption of the rent-free lands. On this point his attitude was in a marked contrast with the Bengal officials. As we shall see in the next chapter, the Bengal government preferred the resumption of these lands in order to increase the revenue.<sup>8</sup> It appointed special commissioners for that purpose in Lower Bengal by Regulation III of 1828.<sup>9</sup> But Malcolm proposed that these lands of the heir-less chiefs and sardars should not be resumed by the government but should be kept in their hands, while the revenue from these lands should be realised in the form of nuzzerana. The reason was that it would limit the ‘spirit of discontent and turbulence’ and cultivate ‘attachment and allegiance’ of the chiefs as the least objectionable to them as a form of taxation.<sup>10</sup> As this issue of nuzzerana exemplifies, the maintenance of the native aristocracy was the foundation of the government’s indirect rule in the mofussil. The exemption of sardars had to be maintained in order to suppress raiders and maintain paramountcy in the mofussil. The King’s Court endangered Malcolm’s vision of empire.

## II. The logic of law and the logic of emergency

The habeas corpus case of Moro Ragonath originated in a conflict over the management of property of a Hindu undivided family, the Dhunderes. Moro

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<sup>8</sup> PP 1831–32 (735-III), Appendix, 87, Lord Moira, minute, 21 Sep. 1815.

<sup>9</sup> Rosselli, *Bentinck*, 262. A. F. Salahuddin Ahmed, *Social ideas and social change in Bengal, 1818–1835* (2nd edn, Calcutta, 1976), 115–25.

<sup>10</sup> PP 1831–32 (735-III), Appendix, 534–5, 538, J. Malcolm, minute, 10 June 1828; BL, IOR P/370/9, BRC 22 Apr. 1829, no. 42, J. Malcolm, minute, 6 Apr. 1829.

Ragonath Dhumdere was a minor in a branch of the family, and Pandoorung Ramchunder Dhumdere was Moro's grand uncle. The Dhunderes had been in charge of the daftar (records) under the peshwa's government. Pandoorung was a personal friend of the peshwa. His grand-nephew married with the peshwa himself.<sup>11</sup> Both Moro and Pandurang were on the lists of sardars. Moro was in the third class in the criminal list and the second class in the civil list. Pandoorung was the second class sardar in criminal and civil lists.<sup>12</sup>

Pandoorung and Moro were involved in a conflict over family property. When his father died, Moro was first under the charge of his mother and grandmother, but as both died, he was protected by Mahadajee Pundit, the family's karkoon (clerk) managing his estate. Thereafter, he was under the influence of his father-in-law Dinker Gopall Deo and the karkoon. While Pandoorung insisted that the property was not divided, the karkoons claimed that the share solely belonged to the minor.<sup>13</sup> This kind of karkoons' attempt to appropriate their master's fortune was well known among the Bombay officials. Chaplin referred to the karkoons of the Tasgaum branch of the Patwardhans who attempted to 'suppress or destroy the will of their late master and to usurp the management of the estate according to a forged

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<sup>11</sup> Moro's father, Rughoonath Moreshwer, was educated under Pandoorung Ramchunder, and they lived as an undivided family. The father of Pandoorung had a hereditary appointment in the Duftar of the peshwa, which descended to the three sons: Pandoorung Ramchunder, Moro Ramchunder, and Hurree Ramchunder. The Duftar duties were conducted by the three as an undivided family and jointly conducted the Duftar duties. When the daughter of Hurree was forced to be married with the peshwa Baji Rao II by Pandoorung, Hurree separated from the two, while Pandoorung and Moro's father continued to live together. BL IOR/V/27/70/10, 33.

<sup>12</sup> BL, IOR, P/399/64, BJC 18 Oct. 1826, no. 29, M. Elphinstone, minute, 5 Sep. 1826.

<sup>13</sup> BL, IOR F/4/1030/28289, 325–36, J. A. Dunlop to J. Malcolm, 11 Oct. 1828.

instrument'.<sup>14</sup>

The government could not ignore the political and social influence of Pandoorung. Under the British government he held an important office of amanatdar who was in charge of managing extensive records left in the peshwa's secretariat (huzur daftar).<sup>15</sup> He held several inam villages in the Deccan, and well understood his power to negotiate with the government. He frequently petitioned the government to protect his customary rights and privileges. Immediately after the Agent for Sirdars was appointed in 1827, Pandoorung requested the government to insert his name in the lists of sardars.<sup>16</sup> Four months later, he complained that villagers in his inam and jagir lands in Khandesh, Ahmednagar and Poona were arrested under the process of the court of munsifs and demanded the exemption of his subordinates as well as of himself. He explained that the regulation vested the first and second class sardars with the original jurisdiction of the inhabitants in their inam and jagir lands. The collectors were perplexed by this claim because, apparently, there were no such stipulations in the regulations. But the government admitted that it was the custom in the Deccan which should be followed by the judicial authorities in the mofussil.<sup>17</sup> This episode clearly indicates that the government could not prevent the abuse of the regulations by the great sardars such as Pandoorung Ramchunder.

The immediate context of the family conflict was Pandoorung's demand for Moro to share his debt. In early 1820, a suit was instituted in the

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<sup>14</sup> Chaplin, *Report*, 160, 164

<sup>15</sup> A. R. Kulkarni (ed.), *History in practice: Historians and sources of medieval Deccan-Marathas* (New Delhi, 1993), 127, 154.

<sup>16</sup> BL, IOR P/400/14, BJC 16 Jan. 1828, nos. 38–9, Pandoorung Ramchunder to Gov., 7 Nov. 1827.

<sup>17</sup> BL, IOR P/400/17, BJC 14 May 1828, nos. 59–60, P. Ramchunder to Gov., 10 Apr. 1828; BL, IOR P/400/17, BJC 11 June 1828, nos. 1–2, S. Marriott to Gov., 23 May 1828; *Ibid.*, no. 49, W. J. Lumsden to Gov., 26 May 1828.



panchayat by Pandoorung against Moro. Pandoorung demanded the joint payment of debt incurred by his pilgrimage to Benares up to the year 1816, which amounted to Rs 4,91,525.<sup>18</sup> As C. A. Bayly points out, to go to the pilgrimage to the holy cities of Benares, Allahabad, Jaganath, and Gaya and to contribute to building temples, ghats, and colleges by donation were important for the Maratha princes and nobility to claim their princely status.<sup>19</sup> The case was decided in the adalat in favour of Pandoorung. The first decree was given in 1821 by the majority of panchayat. Moro immediately appealed to the zilla court of Poona and petitioned the Deccan Commissioner. Chaplin ordered in 1824 that Moro should pay his share of debt Rs 2,45,000 with fine Rs 9,800.<sup>20</sup> His estates were attached and his karkoons were detained on his behalf. The appeal to the governor was admitted, but in 1826 the governor confirmed the decision of the Commissioner.<sup>21</sup> Meanwhile, Pandoorung told the government that Moro's karkoons appropriated Moro's property. The government inquired it, but the karkoons refused to give the account of the estates. The government appointed Pandoorung as Moro's guardian in 1827.<sup>22</sup> When the karkoons of Moro Ragonath decided to resort to the King's Court instead of appealing to the Privy Council, this family conflict developed into one of the largest political crises in early nineteenth century India.

In July 1828, Governor Malcolm received a letter from John A. Dunlop, the Agent for Sirdars, notifying him that Moro had been taken away from the

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<sup>18</sup> BL, IOR P/399/35, BJC, 23 June 1824, 3522–81, W. Chaplin to Gov., 9 June 1824.

<sup>19</sup> C. A. Bayly, *Rulers, townsmen and bazaars: North India in the age of British expansion 1770–1870* (Oxford, 1997), 137

<sup>20</sup> BL, IOR P/399/35, BJC, 23 June 1824, 3522–81, W. Chaplin to Gov., 9 June 1824.

<sup>21</sup> BL, IOR P/399/40, BJC, 1 Dec. 1824, 8518, James Farish, secretary, memorandum on the proceeding of the appeal of Moro Ragonath.

<sup>22</sup> BL, IOR F/4/1030/28289, 325–36, J. A. Dunlop to J. Malcolm, 11 Oct. 1828.

house of Pandoorung by the bailiffs of the Supreme Court. In order to resume Moro from Pandoorung's confinement, the karkoons collaborated with one Pandoorung Herajee, an inhabitant of Bombay city, to file a suit against Moro in the Supreme Court to attach him and bring him to Bombay by the writ of *capias* for the debt of Rs 11,400.<sup>23</sup> Malcolm and Dunlop immediately conceived that the case was a conspiracy to abuse the process of the King's Court. Malcolm said 'it might be a trick' and such a writ must not have been issued. They also realised that this might develop into yet another case of conflict with the King's Court. Dunlop expressed his opinion that 'this case among many others is one of which we might have been pretty sure of the illegality, but we were led to believe that the judges would not allow any other authority to interfere, ever, with the illegal acts of their officers, reserving to themselves the right of judging ...'.<sup>24</sup> But Malcolm was optimistic at this stage because the chief justice, Edward West, agreed with his view. In their meeting, West admitted that it was 'a complete fraud' by the discontented part of the family to kidnap the minor, the writ was a false one, and the bailiffs had no right to take him away. He recommended Malcolm to prosecute the bailiffs in the Supreme Court.<sup>25</sup> However, this correspondence was followed by the death of the chief justice, and the remaining puisne judges, Charles Chambers and John Peter Grant, took a far more antagonistic attitude against the government. Malcolm's fear was becoming reality.

The chief concern of Malcolm was that the Indians might misconceive that the Supreme Court was superior to the government. Malcolm expressed

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<sup>23</sup> BL, IOR H/736, 749–50.

<sup>24</sup> BL, IOR L/PJ/3/918, 55–8, B JL, Gov. to CoD, 27 Sep. 1828, J. A. Dunlop to J. Malcolm, 10 July 1828 and J. Malcolm to J. A. Dunlop, 11 July 1828.

<sup>25</sup> *Ibid.*, J. Malcolm, note, n.d. (Proceeding dated 10 Sep. 1828) and Edward West to J. Malcolm, 13 July 1828.

his sense of danger as follows:

Nothing can be more calculated than such occurrences to weaken the civil government, and to encourage the discontented and seditious ... members in our Indian Dominions. The establishment of our power in the Deckan is too recent and its inhabitants too ignorant to enable them to understand those limits, and distinction of authority. The consequence is an impression of division in our internal rule, which is most dangerous to our power.<sup>26</sup>

He explained that the Indians regarded the King's Court 'as something great and wonderful, and think ... that there is not an action of government, civil, political, or military, that is not subject to its revision or control'.<sup>27</sup> What was lacking in India was the 'publicity' about the authority of the government, 'that the governed should understand the causes and grounds of every action of those that govern them, and know to what they were liable, and what was the nature and extent of that authority local and remote to which they were to grant respect and obedience'.<sup>28</sup>

The case immediately developed into a critical situation. On 25th August, a writ of habeas corpus was moved in the court, and on 29th it was issued. James Dewar, the Advocate General, reported that the judges were intending to instruct the bailiffs to request the assistance of the military to execute the writ, and if it should be refused, they would close all the courts of law in Bombay.<sup>29</sup> Pandoorung represented Malcolm 'in a very crowded durbar' that when the rumour of battalion's mobilisation was circulated, a large number of people gathered around his house to see what was happening

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<sup>26</sup> Ibid., J. Malcolm, minute, 17 July 1828.

<sup>27</sup> Ibid., J. Malcolm to Thomas Bradford, Commander in Chief, 18 July 1828.

<sup>28</sup> Ibid.

<sup>29</sup> BL, IOR F/4/1030/28288, 216–9, James Dewar to J. Malcolm, 14 Sep. 1828.

and ‘his enemies were exulting in his anticipated disgrace’.<sup>30</sup> The use of the military by Supreme Court was not a totally unrealistic prediction. Malcolm once suspected that Thomas Bradford, the Commander in Chief of the Bombay army, was thinking of supporting the judges. Malcolm determined that if such a case should happen, Bradford should be deported.<sup>31</sup> Though this did not happen, Malcolm worried about the development of the event. On 29th September the alias habeas corpus was issued. Malcolm told Pandoorung via Dunlop that he should not receive it.<sup>32</sup>

This case of Moro Ragonath was accompanied by another case of habeas corpus, in which the government criticised the King’s Court’s issuing of the writ *within* its jurisdiction on the ground of political expediency. It was issued on 15 July 1828 to the gaoler of Thana in the Northern Koncan to bring the body of one Bappoo Gunness, a revenue defaulter. Bappoo Gunness was judged guilty in the Company’s Court for embezzlement, sentenced two years’ confinement and fined Rs 350.<sup>33</sup> This was a typical use of the King’s Court by a revenue defaulter similar to those cases which we saw in Chapter 3. Advocate General Dewar advised Malcolm not to take an extreme measure of interfering in the King’s Court’s process, as the gaoler was under the Company’s employment and therefore the case was clearly within the jurisdiction of the Supreme Court.<sup>34</sup> However, because it happened at exactly the same time as the case of Moro Ragonath, a common case of the revenue

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<sup>30</sup> Ibid., 233, J. Malcolm to J. Dewar, 18 Sep. 1828.

<sup>31</sup> John William Kaye, *The life and correspondence of Major-General Sir John Malcolm*, 2 vols. (London, 1856), ii. 524–5.

<sup>32</sup> BL, IOR F/4/1030/28288, 254–5, J. Malcolm to J. A. Dunlop, n.d.

<sup>33</sup> BL, IOR F/4/1030/28289, 407–32, E. H. Baillie, Northern Concan Judge, to Gov., 13 Sep. 1828, enclosing the court proceedings of 8 May 1828 and J. Dewar’s reports dated 2 Oct. 1828. nazir: any officer of a court authorized to serve or execute its process.

<sup>34</sup> BL, IOR L/PJ/3/918, 55–8, B JL, Gov. to CoD, 27 Sep. 1828, J. Dewar to J. Malcolm, 21 Aug. 1828.

defaulter became crucially important for the government's contest against the King's Court. Malcolm replied Dewar that the case should be considered on political rather than legal grounds.<sup>35</sup> Thereafter the government dealt with the two cases as one. In the trial, Bappoo Gunness was defended by the indefatigable James Morley, who vindicated the King's Court's privilege of reviewing the proceedings of the Company's Court as the King's Bench could do in regard to the inferior courts in Britain.<sup>36</sup>

The government made two arguments in the court. One was that the King's Court had no power to issue a prerogative writ to those who were outside its ordinary jurisdiction.<sup>37</sup> The other point was that the case of Moro Ragonath was a case of emergency, in which the state necessity should supersede the legality. Dewar repeated Malcolm's sense of danger in the court:

the situation of the English in India was so dependent on the opinion entertained of their power and union among themselves that things which at home were of no import were here of the highest consequence, if calculated to disquiet or unsettle the minds of the Natives, or destroy their faith in the justice or belief in the power of the local Government.<sup>38</sup>

The judgement of the Supreme Court was based on a totally different logic. Firstly, Chambers claimed that the King's Court had the power to issue a prerogative writ, which was 'unlimited both as to place and person within the territories subject to the Bombay Government', for the court was vested

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<sup>35</sup> Ibid., J. Malcolm to J. Dewar, 3 Sep. 1828; BL, IOR F/4/1030/28288, 240–1, J. Malcolm to J. Dewar, 18 Sep. 1828. Malcolm had once asked Bradford, the Commander in Chief, to impress Dewar 'with the political necessity' of being 'uncompromising'. Ibid., J. Malcolm to T. Bradford, 18 July 1828.

<sup>36</sup> BL, IOR F/4/1030/28289, 444–50, J. Dewar to Gov., 27 Sep 1828.

<sup>37</sup> BL, IOR L/PS/6/180, 21–7, Supreme Court report, 15 Sep. 1828, 1–7, J. Dewar.

<sup>38</sup> BL, IOR L/PS/6/180, 27, *Supreme Court report*, 15 Sep. 1828, 7, J. Dewar.

with the power of the King's Bench in Britain to protect the personal and civil liberty of the Indian subjects.<sup>39</sup> Grant elaborated this point by employing a distinction within the power of the court. One was *potestas jurisdictionis*, the judicial power of hearing and determining civil and criminal cases, and the other was *potestas imperii*, the ministerial or mandatorial power of the sovereign to command something to be done. He argued that the latter was not the matter of jurisdiction: 'the limits of the Jurisdiction of any Court to try causes afford no measure of its power to issue the prerogative writs of the Crown, either in respect of the *territory* in which they are to run, of the *persons* to whom they shall be directed, or of the *matters* they may concern and grow out of'.<sup>40</sup> To make this point, the judges extensively relied on the legal authorities of the common law tradition such as Edward Coke and Matthew Hale, the opinions of English judges such as Lord Mansfield and Lord Eldon, and the precedents such as the case of *R v. Monisse* in Madras in 1810, in which a sovereign prince was subjected to the court's prosecution.<sup>41</sup>

As was clearly shown in the above claim of *potestas imperii*, the judges emphasised that they were vested with a sovereign power to command the orders of the King; it was a question of 'the *power of the King in right of his Crown* exercised by his Supreme Judges in this part of his Dominions'.<sup>42</sup> A logical consequence of this argument was that even the government should obey the order of the King's Court:

the Governor of this Presidency, and the council, and the Commander in

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<sup>39</sup> BL, IOR L/PS/6/180, 70, 73, *Supreme Court report*, 29 Sep. 1828, 10, 13, Charles Chambers.

<sup>40</sup> BL, IOR L/PS/6/180, 84, *Supreme Court report*, 29 Sep. 1828, 26, John Peter Grant.

<sup>41</sup> Ibid.

<sup>42</sup> BL, IOR L/PS/6/180, 95, *Supreme Court report*, 29 Sep. 1828, 35, J. P. Grant

Chief, and all persons in authority are bound to pay obedience to the commands of the Court in execution of its several powers ... so that in any of these persons to refuse obedience was a direct breach of their allegiance to the royal authority and to the sacred person of the King.<sup>43</sup>

In essence, then, the judges articulated that it was the King's Court rather than the Company that truly represented the King's sovereignty of India.

Secondly, the judges argued that the case of Moro Ragonath was not a case of emergency. Chambers admitted that 'in times of sedition or public commotion', the general privileges of the subjects should be suspended for the public good, but it was not applicable to this case. He said that the Court would admit the government's power of arbitrary imprisonment of state prisoners on the ground of state necessity, but 'the present case involves no such difficulty, and the principle which we are now considering is of the most general nature'.<sup>44</sup> Chambers later criticised that it was the government that had 'a mischievous tendency ... to create unnecessary alarm', for the case of Moro Ragonath was 'of no public importance nor of any political consequence .... There are no circumstances of state policy affecting it'.<sup>45</sup> The denial of the existence of emergency was essentially necessary for the judges to claim the superiority of the municipal courts in a civilian society.

In the same vein, Grant defined the case as an issue of personal, not political, liberty of the Indian subjects. By doing so, he could claim the judges' power to check the government's violation of civil liberties and avoided the criticism that they were politically jeopardising the Indian empire:

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<sup>43</sup> BL, IOR L/PS/6/180, 100, *Supreme Court report*, 10 Oct. 1828, 40, J. P. Grant.

<sup>44</sup> BL, IOR L/PS/6/180, 69, 74, *Supreme Court report*, 29 Sep. 1828, 9, 14, C. Chambers.

<sup>45</sup> BL, IOR L/PS/6/180, 97, *Supreme Court report*, 6 Oct. 1828, 37, C. Chambers.

It is very true that this is a matter which nearly concerns personal liberty; and I may observe in passing that, although in the British Dominions in India, as in other colonial possessions, the same degree of *political liberty* cannot exist as in the governing country, yet the *personal liberty* of every individual in all the parts of His extensive Dominions, scattered over every clime, and at every variety of distance from the seat of His Government, is equally under the special protection of the King in England, and of His Courts.<sup>46</sup>

This assertion of civil liberties and the denial of political emergency were made possible by the judges' clear distinction between Indian India and British India. The government saw India as a confederation composed of different countries. The government's Advocate General Dewar told the court that the jurisdiction of the King's Court could not be extended to 'another Kingdom, the Deccan, the Malwa, or other Countries, as separate from each other, and from Bombay, as Russia from Austria'.<sup>47</sup> However, the judges thought that the Deccan was 'the only part of the territory subject to the Bombay Government', 'a part of the vast fabric of the English Empire, and its inhabitants ... are, as subjects to the Crown of England, entitled to the privileges of Freeman'.<sup>48</sup> Chambers alluded to the case of Amerchund Bedreechund, in which the court exhibited a similar distinction, and said that since the conquest of the Deccan in 1817, its inhabitants had been 'the subject of a mixed and limited monarchy', and those who were born after 1817 were Britain's 'natural born subjects'.<sup>49</sup>

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<sup>46</sup> BL, IOR L/PS/6/180, 78, *Supreme Court report*, 29 Sep. 1828, 18, J. P. Grant, emphasis original.

<sup>47</sup> BL, IOR L/PS/6/180, 66, *Supreme Court report*, 29 Sep. 1828, 6, J. Dewar.

<sup>48</sup> BL, IOR L/PS/6/180, 69–70, *Supreme Court report*, 29 Sep. 1828, 9, 10, C. Chambers,.

<sup>49</sup> BL, IOR L/PS/6/180, 70, *Supreme Court report*, 29 Sep. 1828, 10, C. Chambers.



The series of associations of ideas exhibited in the judges' argument were dangerous for the government. Malcolm proposed that the government should protect Pandoorung and resist all further attempts by the King's Court, and if the judges should proceed to enforce its decrees:

they must be met at all hazards by the power of Government, the exercise of which will be fully justified, not merely on the grounds of expediency and policy, but on that of self-preservation, a principle which in the rare cases in which it is brought into action, must supersede all others.<sup>50</sup>

For him, the King's Court's prerogative writs in the mofussil would incur 'the complete subversion of the constitution of all our judicial institutions'.<sup>51</sup> He could not admit the situation in which a peon who brought about the writ to Pandoorung could say 'I can if I choose go and take your Governor prisoner'.<sup>52</sup>

Based on the above considerations, the government finally directly intervened in the judicial process of the court by sending a letter to the Supreme Court on 3 October 1828. The letter desired the judges to 'abstain from any acts (however legal you may deem them) ... which must have the effect of producing open collision' between the government and the Supreme Court, for the supposed division of authority within the British would jeopardise the government's rule in India. It further specified that as a result of the cases of Moro Ragonath and Bappoo Gunness, they were compelled to 'direct' that no further proceedings should be admitted in the case of Moro Ragonath, and no returns would be made to writs of habeas corpus directed to

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<sup>50</sup> BL, IOR F/4/1030/28289, 26–7, J. Malcolm, minute, 2 Oct. 1828.

<sup>51</sup> Ibid, 37, J. Malcolm, minute, 2 Oct. 1828.

<sup>52</sup> BL, IOR F/4/1030/28289, 79–80, J. Malcolm, minute, 3 Oct. 1828.

the Company's officers or Indian inhabitants in the mofussil. The government admitted that it was irregular to interfere in the court's process, but justified its acts from 'exclusive reference to considerations of Civil Government, and of state policy'.<sup>53</sup>

The judges were infuriated, as Malcolm expected.<sup>54</sup> Chambers criticised the irregularity of the government's sending a public letter in such a dictatorial manner. The Court should be addressed by anyone in no other way than as a humble suitor soliciting its protection through their counsel or a petition. The EIC did not have any privileged position in the court in this respect. Its act was 'highly unconstitutional and criminal'. Grant said that the government did not understand that the writ of habeas corpus was not a matter of discretion in the judges but a 'writ of right'. The court replied to the government that the letter was received and that the judges could take no notice thereof.<sup>55</sup> On 10th October, the court issued a pluries writ of habeas corpus with fine of Rs 10,000.<sup>56</sup> Puisne Judge Chambers died three days later, and Grant continued his battle with the government alone.

In order to appeal his justice, Grant petitioned the King in Council in November 1828. This act provoked a further conflict between the government's political logic of emergency and the court's civilian logic of law. For Grant, the case of Moro Ragonath was 'a question of private right regarding the personal liberty'. The government's letter of 3 Oct 1828 was

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<sup>53</sup> BL, IOR L/PS/6/180, 77–9, *Supreme Court report*, 6 Oct 1828, 17–9. The petition was also printed in Malcolm, *Government of India*, Appendix C, 118–20.

<sup>54</sup> Malcolm observed that 'we must expect from the present temper of the judges that they will go to every extreme'. *Bentinck Correspondence*, i. 83–4, J. Malcolm to W. Bentinck, 7 Oct. 1828.

<sup>55</sup> BL, IOR L/PS/6/180, 96–100, *Supreme Court report*, 6 Oct 1828, 36–40, C. Chambers and J. P. Grant.

<sup>56</sup> BL, IOR F/4/1030/28289, 265–9, J. Dewar to Gov., 10 Oct. 1828.

‘the most unconstitutional and criminal attempt’ to threaten the Court with civil and military power of the government. It was the government that was causing a public disturbance by diminishing ‘respect for the court and confidence in the law, which are the only sure foundations of such peace and obedience’. The government was endangering the British rule not only in the Deccan, which was still unsettled, but also that in the Konkan and Gujarat ‘now for many years peacefully submitted to the British rule’. It was dangerous to leave the Company’s provincial courts without control and to place the inhabitants without the protection of habeas corpus.<sup>57</sup>

Malcolm criticised Grant’s lack of knowledge about the crisis in the mofussil. Gujarat was still troubled by the ‘predatory tribes of Bheels, Cooleys, and Rajpoots’ and by the invasions of Muslim and Maratha princes. The writ of habeas corpus was ‘little short of a general gaol delivery throughout all the provinces subject to the presidency’. The Supreme Court would set free every criminal, and as a consequence, villages and tracts of cultivation would be wasted, outlawry inhabitants would increase, the revenue would fall off, and ‘regularity and public peace and security would be at an end’.<sup>58</sup>

As shown in the above comment, Malcolm emphasised the King’s Court’s detrimental effect on the government’s policy of preventing raids by means of the sardars’ indirect rule. The power of the chiefs was ruined by the rigid forms and processes of the British law, which were appropriated by their discontented dependants in collaboration with lawyers and vakeels. In order to ‘preserve and create a native aristocracy’, the government conciliated the

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<sup>57</sup> Malcolm, *Government of India*, Appendix C, 115–28, J. P. Grant’s petition to the Privy Council, Nov. 1828.

<sup>58</sup> *Ibid.*, 136–43, J. Malcolm, minute, 30 Nov. 1828.

sardars and introduced a simple code of regulations, but these efforts would be nullified if the King's Court's jurisdiction was extended to the mofussil. Baroda and Satara made suspicious moves (as we saw in Chapter 5), and Angria and other chiefs solicited the government to protect them when their discontented servants or seditious dependents should file a suit for their oppression. Its jurisdiction would 'seriously weaken the authority and accelerate the downfall of our power in this quarter of India'.<sup>59</sup> The minute was sent to the Court of Directors.<sup>60</sup>

In this way, the government firmly set the case in the context of the King's Court's interference in the government's sardar policy in the mofussil. As we saw in previous chapters, this was not new. Since the British conquest in the provinces, the problem had recurred. But at the same time, the timing of the Moro Ragonath case seemed to be important to make it such a big issue. The government had just completed furnishing the system of protecting sardars by the revised regulations of 1827. The memory of the 1824 crisis in Kittur was still fresh, and the raiders were encouraged by the conspiracies of the rajas of Satara and Kolhapur. It happened in less than six months since the failure of the Gaekwad's mission to the Bombay Supreme Court. These factors converged to harden the attitude of the government against the King's Court.

### III. Court procedures

The judges' resistance to the government depended on their power to control the court procedures. As we saw in Chapter 2, the power of ruling the evidence was the most important of them. Throughout the proceeding, the

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<sup>59</sup> Ibid., 146–51.

<sup>60</sup> BL, IOR L/PS/6/180, 207–314, BPL, Gov. to CoD, 9 Dec. 1828.

government assumed that it was Moro's karkoons who had instigated the boy to make the legal actions. Indeed, at an early stage, Malcolm received a letter from Moro Ragonath himself stating that he was happy under the guardianship of Pandoorung and that it was the karkoons who appropriated his property and filed the suit in the Supreme Court.<sup>61</sup> Malcolm believed that the letter was genuine and ordered the Advocate General to make use of the letter in the King's Court.<sup>62</sup> But Dewar replied that even if the letter was presented to the court, the judge would say that it was extracted and ignore it. Dewar confessed that there would be no remedy on this matter. Malcolm concurred.<sup>63</sup> Thereafter, the government repeatedly failed to make their argument in the court because of this procedural power of the judges.

In February 1829, Grant finally ordered the attachment of Pandoorung Ramchunder for not returning the pluries (or the third) writ of habeas corpus. He directed the governor and members of the council to execute the writ in the king's name. If the government did not obey the order, it would be 'guilty of a great contempt'.<sup>64</sup> The government left it unnoticed and referred the court to their letter on 3 October 1828.<sup>65</sup> Grant claimed that the bailiff of the court was 'violently opposed' by the Company's civil and military officers with a display of military power.<sup>66</sup> In the court, Grant dramatized this incident of

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<sup>61</sup> BL, IOR F/4/1036/28549(7), J. A. Dunlop to Gov., 26 Nov. 1828, enclosing a letter from Moro Ragonath to the Governor, dated 5th Jemadee ool Auul.

<sup>62</sup> BL, IOR F/4/1036/28549(7), J. Malcolm, minute, 29 Nov. 1828.

<sup>63</sup> BL, IOR L/PS/6/180, 323–6, BPC 21 Jan. 1829, J. Dewar to Gov., 9 Dec. 1828.

<sup>64</sup> Ibid., 498–503, BPC 4 Mar. 1829, no. 8, J. Dewar to Gov., 27 Feb. 1829; Ibid., 504–16, SC to Gov., 9 Mar. 1829, BPC 18 Mar. 1829.

<sup>65</sup> Ibid., 519–28, BPC 18 Mar. 1829, J. Malcolm, minute, 12 Mar. 1829, and Gov. to SC, 13 Mar. 1829; Ibid., 666–76, BPC 22 Mar. 1829, SC to Gov., 21 Mar. 1829; Ibid., 676–81, BPC 22 Mar 1829, J. Malcolm, minute, n.d., and Gov. to SC, 22 Mar. 1829.

<sup>66</sup> Ibid., 589–620, BPC 17 Mar. 1829, SC to Gov., 17 Mar. 1829, Affidavit of Carrapiet Saffer dated 31 Oct. 1829; Ibid., 908, BPC 15 Apr. 1829, no. 124, J.

‘the Provincial Government employing the Troops to oppose its Process’.<sup>67</sup>

The government inquired about the incident and believed that it was false, but could not sue the bailiff for perjury as there was not sufficient evidence to prove it.<sup>68</sup>

The government also failed to prosecute the kidnappers of Moro Ragonath (Pandoorung Herajee, Madoo Sewba and others) in the Supreme Court. The court ruled that the criminal information could not be filed as the defendants were not amenable to its jurisdiction. Grant pointed out that it was a contradiction that the government denied the King’s Court’s jurisdiction in the case of Moro Ragonath while admitted it to prosecute the kidnappers living in the mofussil.<sup>69</sup> Malcolm had to abandon the suit, explaining that it was better to let the criminals escape than to make the government look incoherent on the pivotal point of the case of Moro Ragonath.<sup>70</sup> The government’s failure to prosecute was immediately reported by the *Bengal Hurkaru*, a leading English newspaper in Calcutta.<sup>71</sup>

To resist the government further, Grant closed the Supreme Court in April 1829 ‘until the Court receives an assurance that its authority will be respected and its Process obeyed, and rendered effectual by the

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Malcolm, minute, 9 Apr. 1829; Ibid., 908, BPC 15 Apr. 1829, no. 124, J. Malcolm, minute, 9 Apr. 1829.

<sup>67</sup> Ibid., 888–902, *Supreme Court report*, 21 Apr. 1829, J. P. Grant.

<sup>68</sup> BL, IOR L/PS/6/181, 17–21, BPL, Gov. to CoD, 10 July 1829; BL, IOR L/PS/6/180, 914–37, BPC 12 May 1829, no. 84, Lionel Smith to Adjutant General, 30 Apr. 1829, and the Board’s minutes. Malcolm recommended the Commander in Chief in England to take any measure to counteract the false impression.

<sup>69</sup> *Bombay Courier*, 14 Mar. 1829; BL, IOR L/PS/6/180, 850–73, *Supreme Court report*, 7 Feb. 1829.

<sup>70</sup> BL, IOR L/PS/6/180, 487–96, BPC 4 Mar. 1829, nos. 5–6, J. Dewar to J. Malcolm, 25 Feb. 1829, and J. Malcolm, minute, n.d.; Ibid., 529–86, BPC 18 Mar. 1829, J. Dewar to Gov., 4 Mar. 1829, J. Dewar to Gov., 5 Mar. 1829, J. Malcolm, minute, 12 Mar. 1829.

<sup>71</sup> BL, IOR L/PS/6/180, 952–6, BPC 15 May 1829, J. Dewar to Gov., 30 Apr. 1829.

Government'.<sup>72</sup> This was noticed in the special issue of the *Bombay Courier* with Grant's further attack on the government.<sup>73</sup> Grant claimed that it was the government that necessitated the closure, because it distorted the case of Moro Ragonath as state necessity while it was nothing but an 'ordinary case of confining a culprit'.<sup>74</sup> Here again we see the judge's attempt to deny the government's claim of state necessity by interpreting the situation as a civilian state under the jurisdiction of the municipal court.

The government responded by issuing a proclamation in the *Bombay Courier* that the governor would make 'every effort in his power to protect their persons and property during this Extraordinary conjuncture'.<sup>75</sup> Dewar listed the inconveniences caused by this measure: criminals would not be arrested and prisoners would remain untried; debtors would escape from their creditors; no warrants could issue from the admiralty side of the court; the intestate estates would be wasted as the ecclesiastical side was shut; and no one could be brought up by habeas corpus for the purpose of being bailed. He lamented that 'we are now ... in a state without law'.<sup>76</sup>

The government's difficulty was exacerbated by its inability to control the flow of information on the court proceedings. Malcolm was concerned about the circulation of the strong language of the judges criticising the

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<sup>72</sup> *Bombay Courier Extraordinary*, 2 Apr. 1829; BL, IOR L/PS/6/180, 874–9, *Supreme Court report*, 1 Apr. 1829.

<sup>73</sup> *Ibid.*, 878. On the 2nd April Grant also sent a letter to the Governor General in Calcutta on the closure of the court. He emphasised that it was the government that forced him to close the Court. *Ibid.*, 710–41, J. Grant to Governor General, 2 Apr. 1829.

<sup>74</sup> Grant stated that the government's letter on 3 October 1828 was a 'declaration of war', which was 'nothing else in the eye of the law than placing the Country in a *state of war*'. BL, IOR L/PS/6/180, 899–902, *Supreme Court report*, 21 Apr. 1829.

<sup>75</sup> *Bombay Courier Extraordinary*, 7 Apr 1829; BL, IOR L/PS/6/180, 706–7, BPL, Gov. to CoD, 8 Apr. 1829, and BL, IOR L/PS/6/180, 880, proclamation.

<sup>76</sup> BL, IOR L/PS/6/180, 749–50, 753–4, BPC 8 Apr. 1829, J. Dewar to Gov., 2 Apr. 1829.

government.<sup>77</sup> The government prohibited the newspapers from publishing any proceedings at the Supreme Court.<sup>78</sup> But a Gujarati newspaper *Summachar* continued reporting the speech of the judges in 1828 and 1829.<sup>79</sup> Besides, there was a dense Indian network of information. Malcolm lamented that the native correspondence was faster than that of the government and there were many unnoticed exchanges between the nobility in the Deccan and the peshwa at Benares on the case of Moro Ragonath.<sup>80</sup> Furthermore, the government could not prevent the in-flow of metropolitan radical ideas which were reprinted in newspapers and magazines.<sup>81</sup> Frustrated, Malcolm commented that if the government would not exercise its power to limit the freedom of the press, it ‘should be permitted to employ the same weapons for their defence’.<sup>82</sup>

In this way, Grant fully used his advantage of controlling the court procedure. The government did not have the means to deal with it. This procedural control was always problematic for the government when it dealt with the Supreme Court. The government sought support from outside the court proceedings. The rest of the chapter turns to the development of the case of Moro Ragonath outside the court room, which I argue decided the final result of the conflict between the government and the King’s Court in Bombay.

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<sup>77</sup> BL, IOR F/4/1030/28289, 344–54, J. Malcolm, minute, 12 Oct. 1828.

<sup>78</sup> Ibid., 375–82, J. Malcolm, minute, 14 Oct. 1828, Government notice, 17 Oct. 1828.

<sup>79</sup> Ibid., 399–406, J. Malcolm, minute, 20 Oct. 1828; BL, IOR L/PS/6/180, 319–22, BPC 14 Jan. 1829, W. Clerk, Acting Persian Secretary, to Gov., 6 Jan. 1829.

<sup>80</sup> BL, IOR F/4/1030/28289, 84–5, J. Malcolm, minute, 3 Oct. 1828. This problem of unchecked correspondence was also recognised by Elphinstone in earlier period. Colebrooke, *Life of Elphinstone*, i, 294.

<sup>81</sup> BL, IOR H/734, 652–3, J. Malcolm to C. T. Metcalfe, 23 June 1829.

<sup>82</sup> BL, IOR F/4/1241/40865, 13–26, BGC 28 Oct. 1829, no. 11, J. Malcolm, minute, n.d.



#### IV. Imperial networks

The open collision between the government and the King's Court dramatically expanded the arena of conflict, as both the government and the King's Court sought support from higher authorities in Calcutta and London. This crucially changed the nature of conflict from one like the previous cases in Bombay to one of the most important imperial conflicts between the executive and the judiciary in nineteenth-century India.

The government sought political and legal support from Calcutta, Madras and London. The Bombay government reported every event relating to the case of Moro Ragonath to the Court of Directors in their political letters, enclosing the proceedings in the governor's council and notes of the court proceedings taken by the Advocate General. In addition to this regular communication channel, after sending the letter on 3 October 1828, the government appointed Major Barnwall, Malcolm's former aide-de-camp, as the special agent to England to transmit the whole proceedings of Moro Ragonath and Bappoo Gunness to the Court of Directors.<sup>83</sup> Barnwall had ample knowledge on the harmful effect of the legal proceedings on the chiefs and sardars as the political agent of Kathiawar, who had worked under Alexander Walker when Gujarat was first annexed to the British territory.<sup>84</sup> At the same time, the government sent letters to Madras and Calcutta and asked for the help of the Advocates General. To seek legal aid from other presidencies was a standard measure at this period, as there were only two

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<sup>83</sup> BL, IOR F/4/1030/28289, 235–7, J. Malcolm, minute, 8 Oct. 1828. The judges and magistrates were instructed that none of them should visit to Bombay. Ibid., 233, 239–40, circular, 10 Oct. 1828.

<sup>84</sup> Malcolm, *Government of India*, 77.

lawyers, the Advocate General and the Company's Solicitor, on whose legal knowledge the government could rely, and as the communication with the Company's legal officers in London (the standing counsel and the solicitor) took time. Throughout the event, the governments of Bengal and Madras supported Malcolm. The Advocates General of Bengal and Madras both agreed with the opinion of the Bombay government.<sup>85</sup>

Besides the public correspondence, Malcolm maintained a large number of private transactions with the politicians in India and London. He frequently exchanged opinions with the Madras governor S. R. Lushington and the governor general William Bentinck at Calcutta, in addition to district officials throughout the Bombay presidency. Bentinck encouraged Malcolm not to compromise: 'You have taken your line and whether right or wrong, you cannot retreat an inch, without compromising the authority of government and without occasioning great political mischief'.<sup>86</sup> In London, the tory politicians such as the Duke of Wellington and Lord Ellenborough were his main correspondents.<sup>87</sup>

The King's Court's resources outside the presidency were limited. Given his emphasis as the true representative of the king, it was natural for Grant to resort to the authority of the King in Council (the Privy Council), which was the final tribunal of the colonial affairs. In November 1828, Grant sent a petition to the Privy Council to complain about the government's interference. He appointed Attorney William Fenwick as the agent of the

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<sup>85</sup> BL, IOR L/PS/6/180, 339–482, BPC 21 Mar. 1829, Gov. to CoD, 9 Feb. 1829; BL, IOR L/PS/6/180, 794–838, BPC 15 Apr 1829; same one in 992 ff., Gov. to Bengal Government [hereafter Ben. Gov.], 15 Apr. 1829.

<sup>86</sup> *Bentinck correspondence*, ed. Philips, i. 93, W. Bentinck to J. Malcolm, 12 Nov. 1828.

<sup>87</sup> For example, see BL, IOR H/734, 311–3, J. Malcolm to the Duke of Wellington, 5 Apr. 1829; BL, IOR H/734, 314–6, J. Malcolm to the Earl of Ellenborough, 5 Apr. 1829.

mission to London.<sup>88</sup> The selection of an attorney instead of a barrister was natural given the conflict between barristers on the one hand and the attorneys supported by the King's Court on the other, which we saw in Introduction.

The other resource outside Bombay which the judges tried to use was the Board of Control, the Supreme Court's supervising body of in London.<sup>89</sup> By this Grant tried to revive the conflict between the government and Company at home over sovereignty and land revenue in the late eighteenth century.<sup>90</sup> The Bombay government complained that Grant spoke 'of that Board as a distinct, not a component part of the Indian Government in England' and tried to impress that 'an assertion of more entire and active sovereignty on the part of the Crown' was only possible by 'a more complete negation of any sovereignty' of the Company.<sup>91</sup> The problem was that, as we shall see later, the president of the Board of Control, Lord Ellenborough, was a staunch supporter of the Bombay government.

Due to the scarcity of record, the extent of the private network of the judges was difficult to know, but it is known that Grant sent via his son William Patrick Grant some letters to the chairman of the EIC or the president of the Board of Control when he resigned, and his Indian supporters also sent a letter to Lord Holland.<sup>92</sup> When the court was closed, Grant solicited support for the supreme government in Calcutta.<sup>93</sup>

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<sup>88</sup> Grant requested Malcolm and other members of the council to attest the signature in the letter on 3rd October, but this was rejected by Malcolm. BL, IOR F/4/1036/28549(7), SC to Gov., 21 Oct. 1828; J. Malcolm, minute, 24 Oct. 1828; Gov. to SC, 24 Oct. 1828; SC to Gov., 3 Nov. 1828; Gov. to SC, 5 Nov. 1828.

<sup>89</sup> Morey, *Digest*, ii. 662, 683, Supreme Court charter, ss. 38, 71.

<sup>90</sup> Bowen, *Business of empire*, 10–11.

<sup>91</sup> BL, IOR F/4/1030/28288, 43–4, BPL Gov. to CoD, 20 Oct. 1828.

<sup>92</sup> See BL Eur Mss F523/59.

<sup>93</sup> BL, IOR L/PS/6/180, 964–88, J. P. Grant to Ben. Gov., 2 Apr. 1829.

It was this difference of the density of public and private networks which decided the course of event. First, the Bengal government was firmly in support of the Bombay government. The Bengal government answered to Grant, referring to the ‘distress which the suspension of the powers of the Court must occasion to the multitudes’, that the suspension should not be continued because it ‘must be highly prejudicial to the general interests of the Empire’. The governor general expressed to the Bombay government his ‘entire concurrence with the view ... of the great evils arising out of the unlimited jurisdiction as assumedly exercised by the Supreme Court at Bombay’.<sup>94</sup>

Second, the authorities at home were also firmly in support of the Bombay government. In September 1828, immediately after the death of Edward West, Malcolm wrote letters to ‘those in authority in England and to all who I supposed were likely to have influence in the nomination’ to make sure that the next chief justice ‘must have temper and judgement, as well as law and above all he must view himself as an aid instead of a check upon the civil government of the country’.<sup>95</sup> Two years later, it finally bore its fruit. Lord Ellenborough, the newly appointed President of the Board of Control, expressed his entire agreement with Malcolm’s idea on the dangers of the Supreme Court and appointed James Dewar, the Advocate General, as the next chief justice. He also appointed William Seymour as a puisne judge, who ‘would rather support Government than use the authority of the Supreme Court as a means of raising opposition’. Ellenborough predicted that ‘no more mischief can happen, as he [Grant] will be like a wild elephant led away

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<sup>94</sup> Ibid., 1040–9, BPL, 15 May 1829, Ben. Gov. to SC, 15 May 1829, and Ben. Gov. to Bom. Gov., 15 May 1829.

<sup>95</sup> BL, IOR H/734, 503–5, J. Malcolm to G. Norton, 9 Sep. 1828; *Bentinck Correspondence*, i. 68, J. Malcolm to W. Bentinck, 19 Aug. 1828.

between two tame ones'.<sup>96</sup> He later added that 'India was won by soldiers and statesmen & we must not allow lawyers to lose it'.<sup>97</sup>

This appointment changed the course of events. In the case of *Moro Ragonath v. Dunlop*, in which Moro's karkoons prosecuted Dunlop for trespass in the Supreme Court,<sup>98</sup> Grant repeated his criticism of the government, but Dewar judged in favour of the defendant.<sup>99</sup> Malcolm thanked Wellington for his support for the appointment of Dewar which was as effective as 'a master stroke'.<sup>100</sup> Malcolm also thanked Ellenborough for the measure which worked 'like at charm'.<sup>101</sup>

The government was further empowered by the decision of the Privy Council in its favour, which was given in May 1829.<sup>102</sup> The counsels for Grant were Thomas Denman, who was also the counsel for Cursetjee Manockjee and Amerchund Bedreechund, whose cases we saw in Chapter 2, and Edward Hall Anderson, a judge of the Common Pleas. Denman and Alderson repeated Grant's argument that the King's Court had the power of issuing prerogative writs in the mofussil, which was distinct from its ordinary civil jurisdiction.<sup>103</sup> The Company was represented by John Bosanquet, the Company's standing counsel, and Robert Spankie, the former Bengal Advocate General. They argued that the court had no such power and that no habeas corpus was issued in India since the enactment of 21 Geo 3 in 1781

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<sup>96</sup> Kaye, *Life of Malcolm*, ii. 528–30, Ellenborough to J. Malcolm, 21 Feb. 1829.

<sup>97</sup> Ellenborough to W. Bentinck, 23 May 1830, quoted in D. N. Panigrahi, *Charles Metcalfe in India: Ideas and administration 1806–1835* (Delhi, 1968), 170.

<sup>98</sup> BL, IOR L/PS/6/181, 135–41, BPC 11 Aug. 1829, R. Mills to Gov., 1 Aug. 1829.

<sup>99</sup> BL, IOR L/PS/6/181, 499–625.

<sup>100</sup> BL, IOR H/734, 419–22, J. Malcolm to Wellington, 7 June 1829.

<sup>101</sup> Ibid., 208–9, J. Malcolm to Ellenborough, 12 June 1829.

<sup>102</sup> 1 Knapp, 1–59.

<sup>103</sup> Ibid., 15, 21, 24, 27.

which corrected many examples of its abuses in 1773 and 1781. They also argued, regarding the Bappoo Gunness case, that the Act stipulated that the officers of the Company's Court were not amenable to the King's Court for their official conducts.<sup>104</sup> Lord Tenterden interfered in favour of the Bombay government, and the Privy Council gave a decision that the Supreme Court could not issue a writ of habeas corpus outside its jurisdiction and that it had no power to release prisoners who were convicted by the Company's Court.<sup>105</sup>

After the decision of the Privy Council was given against him, there were few means left for Grant to contest with the government. Grant tried to do so in a criminal case of Madoo Sewba, one of the kidnappers of Moro Ragonath, who had been convicted for perjury on the indictment of the grand jury.<sup>106</sup> Sewba demanded the attendance of Moro Ragonath was a necessary witness, and Grant issued a new writ of habeas corpus directed to Pandoorung Ramchunder to bring Moro Ragonath.<sup>107</sup> Malcolm stated that 'on grounds of Political Expediency and State Policy its enforcement ought to be openly and fiercely resisted'.<sup>108</sup> Grant criticised it as the prosecution was based on the grand jury's indictment. He sent the affidavits and other papers to the Privy Council.<sup>109</sup> But by abandoning the case, the government finally terminated

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<sup>104</sup> Ibid., 33, 35, 43, 49.

<sup>105</sup> Ibid., 51–9.

<sup>106</sup> BL, IOR L/PS/6/181, 403–5, BPC 31 Aug 1829, Malcolm, minute, 25 Aug 1829; BL, IOR L/PS/6/181, 405–17, BPC 31 Aug 1829 and 10 Sep 1829, Secretary's memorandum, 27 Aug 1829, Romer, minute, n.d. Graves Chamney Irwin to Gov, 7 Sep 1829, Gov to G. C. Irwin and Morgan, 10 Sep 1829.

<sup>107</sup> *Asiatic Journal*, new series, 1 (1830), 138–41.

<sup>108</sup> BL, IOR L/PS/6/181, 37–47, BPC 17 July 1829, G. C. Irwin to Gov., 10 July 1829, J. Malcolm, minute, n.d., G. C. Irwin to Gov., 14 July 1829, Gov. to Poona Judge, Poona Collector and Agent for Sirdars, 17 July 1829; Ibid., 57–61, BPL, 18 July 1829, J. Malcolm, minute, n.d., J. Romer, minute, n.d.; Ibid., 73–5, BPC 23 July 1829, G. C. Irwin to Gov., 16 July 1829, J. Malcolm, minute, n.d.

<sup>109</sup> Ibid., 147–51, BPC 11 Aug. 1829, E. C. Morgan to Gov., 30 July 1829; Ibid., 159–65, BPC 12 Aug. 1829, G. C. Irwin to Gov., 1 Aug. 1829.

the commotion of the Moro Ragonath case in September 1829. Malcolm expressed his delight: 'I am discovered to be a great lawyer. God help them'!<sup>110</sup>

#### V. Indian involvement

The battle of the government and the King's Court was anxiously watched by many Indians whose future conduct might be significantly affected by the result. The sardars in the Deccan had a particular interest in the case, since they would be involved in the same trouble as Pandoorung Ramchunder. They pressed on the government to settle the problem with a petition signed by 112 'principal inhabitants at Poona', which was directly handed to Malcolm by Basker Ram Gokla and Ballajee Punt Nathoo. The former was a third class sardar, a relation of the peshwa's commander-in-chief Bappoo Gokla.<sup>111</sup> The latter was the second class sardar holding inam villages in Poona, Ahmednagar and Kolhapur, and Elphinstone's chief native servant during the Maratha war.<sup>112</sup> Handing the petition, they told Malcom that the agitation has been heightened in all over the Deccan since the writ of habeas corpus was issued; they were concerned about 'the evils ... from the extension of the English law' upon their respectability. The following is the petition:

The settlement of the country (the Dukhun) was made by the Company's Government. At that time certain terms and Agreements were entered into with all persons of good character, high and low, and Regulations established, for the preservation of Rank and Respectability all which

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<sup>110</sup> BL, IOR H/734, 691, J. Malcolm to S. R. Lushington, 10 Sep. 1829.

<sup>111</sup> TNA TS 11 123, 'Privy Council Printed Papers, The Hon. Mountstuart Elphinstone and Henry Dundas Robertson v. Heerachund Bedreechund and Jetmeel Anoopchund', 110.

<sup>112</sup> Ballhatchet, *Social policy*, 93–4.

have been enjoyed. Summonses have lately been issued from the King's Court against Pandoorung Ramchunder Dunderee, which people considered a Breach of these Regulations, it was however well known that the Company's Government shielded us from the evils of this case. But having now that the Court has been suspended in consequence of this affair, doubts have arisen. All people are very apprehensive as to how it will be permanently settled and how their honour and character will be preserved, and protection afforded them. Reflecting on these things we unite in submitting this Petition to Government, and pray that taking the subject into consideration arrangements may be made by which whatever has been enjoyed on the Faith of the Company's Government may be continued in future, and that nothing shall occur to detract from our respectability.

Malcolm replied that there was no real cause for alarm, and their interest and honour would continue to be objects of special care of the government. The petition was forwarded to the Court of Directors and the Bengal government.<sup>113</sup> Whether this petition was solicited by Malcolm was not known, but it was clear that the sardars and the government had a shared interest in resisting the King's Court.

On the other hand, Indian merchants of Bombay city supported the King's Court. The public in Bombay city saw the political elevation of Dewar to the chief justiceship with strong suspicion and cast a jealous eye on all his acts in the court.<sup>114</sup> Their feeling was expressed in two addresses of thanks made at the resignation of Grant as the puisne judge in September 1830. The first address was signed by 4,400 people and read at a meeting at the court house. It was introduced by one Jehangheir Nasserwanjee, a Parsi shopkeeper.<sup>115</sup> It praised the effort of Grant as well as West and Chambers to

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<sup>113</sup> BL, IOR L/PS/6/180, 1052–65, BPC 25 May 1829, nos. 1–3, petition dated 2 May 1829, and J. Malcolm, minute, 12 May 1829.

<sup>114</sup> *Asiatic Journal*, new series, 5 (1831), 71.

<sup>115</sup> *Bombay calendar and almanac for 1833*, app. 187.



protect the Indians in the mofussil from false imprisonment, and articulated that ‘an appellate jurisdiction to the Supreme Court from the judgements of the Provincial Courts [was] the sincere and ardent desire of all the natives who reside under this Presidency’.<sup>116</sup> The second address was read in Grant’s chamber. The meeting was chaired by Jagganath Sunkersett, a Hindu merchant,<sup>117</sup> and the address was read by Bomanjee Hormusjee. It stated that the King’s Court’s British law was the benefit for the mofussil as well as for Bombay city. It was signed by 3,000 inhabitants including the city’s biggest merchants such as Jamsetjee Jeejeebhoy, Dhackjee Dadajee, and Framjee Cowasjee. Jetmul Anoopchund and Heerachund Bedreechund, the plaintiffs of the Amerchund Bedreechund case, also signed it.<sup>118</sup> The government thought these addresses as Grant’s another attempt to ‘heat the kettle’.<sup>119</sup> Indeed, in replying these addresses, Grant advocated the expansion of the King’s Court’s jurisdiction in the mofussil.<sup>120</sup>

These petitions indicate that, while the users of the King’s Court covered the whole spectrum of society including the sardars in family conflicts, the Hindu and Parsi merchants in Bombay represented the political aspiration of the King’s Court’s expanding jurisdiction. Parsi legal prowess is well known. The Parsi community was unique, as Mitra Sharafi shows, in that

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<sup>116</sup> BL, IOR L/PS/6/181, 799–844, BPL, 20 Oct 1830, address and Grant’s reply, 10 Sep. 1830.

<sup>117</sup> *Bombay calendar and almanac for 1833*, app. 187. He became the chairman of the Bombay Association. Nowrozjee Furdoonjee, *On the civil administration of the Bombay Presidency* (London, 1853).

<sup>118</sup> BL, IOR L/PS/6/181, 849–71, BPL, 20 Oct 1830, address and Grant’s reply, 13 Sep 1830.

<sup>119</sup> BL, IOR L/PS/6/181, 739–42, BPL, Gov. to CoD, 15 Sep 1830. Quotation is from *Bentinck Correspondence*, ed. Philips, i. 507, J. Malcolm to W. Bentinck, 8 Sep. 1830. The government notification is in BL, Eur Mss F523/59.

<sup>120</sup> BL, IOR L/PS/6/181, 799–844, BPL, 20 Oct 1830, address and Grant’s reply, 10 Sep. 1830; BL, IOR L/PS/6/181, 849–71, BPL, 20 Oct 1830, address and Grant’s reply, 13 Sep 1830.

they were the only minority group actively engaging in the British legal culture in colonial society.<sup>121</sup> It was reflected in the fact that, when the Indians were selected as grand jurors for the first time in Bombay in 1834, the Parsis constituted nine out of thirteen native members.<sup>122</sup> The Hindu merchant's appropriation of British law was also known, chiefly in the context of their commercial transactions.<sup>123</sup> The petitions show that they were active in using the court in a more directly political way in the early nineteenth century.

These petitions further suggest that, in addition to the jury and the press, the expansion of the King's Court's jurisdiction was the major issue through which Bombay's radicalism was nurtured in the 1820s and the 30s. Those mentioned above who signed the addressed—Sunkersett, Hormusjee, Jeejeebhoy, Dadajee, and Cowasjee—were the directors of the Bombay Native Education Society (later the Elphinstone Institution), which later became the incubator of Indian liberal intellectuals in the middle and late nineteenth century.<sup>124</sup> As Mridula Ramanna points out, the Supreme Court provided employment for the Elphinstonians as interpreters and translators in the early nineteenth century.<sup>125</sup> There was a clear connection between the King's Court,

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<sup>121</sup> Mitra Sharafi, *Law and identity in colonial south Asia: Parsi legal culture 1772–1847* (Cambridge, 2014), 8–9; Jesse S. Palsetia, *The Parsis of India: Preservation of identity in Bombay city* (Leiden, 2001), chapters 3, 5.

<sup>122</sup> Jesse S. Palsetia, 'Mad dogs and Parsis: The Bombay dog riots of 1832', *Journal of the Royal Asiatic Society of Great Britain and Ireland*, 11, 1 (2001), 28; Dobbin, *Urban leadership in western India*, 24.

<sup>123</sup> Subramanian, 'Seths and sahibs'; Smith, 'Fortune and failure'. But see also Subramanian, 'A trial in transition'.

<sup>124</sup> Dobbin, *Urban leadership in western India*, chapters 1–2; Bayly, *Recovering liberties*, 135–7.

<sup>125</sup> Mridula Ramanna, 'Social background of the educated in Bombay city 1824–58', *Economic and Political Weekly*, 14, 4 (1989), 203–5, 207–11; Mridula Ramanna, 'Profiles of English educated Indians: Early nineteenth century Bombay city', *Economic and Political Weekly*, 27, 14 (1992), 716–21, 723–4.

native education and radicalism in early nineteenth century Bombay.

The government officials were well aware of this. William Newnham, a member of the governor's council, put them in the context of a growing tide of radicalism in the presidency towns. He said that the second address was 'radical'; the first one was 'ultra-radical' drafted by a Parsi 'not above the level of retail shopkeepers'. The professional lawyers must be involved in drafting the addresses and the signature must be collected in the same way as that of electioneering in England by distributing blank papers on streets and collecting signs of everyman passing there.<sup>126</sup> Malcolm exhibited a theory of moral contagion from Bombay city to the mofussil. The British law and court in the city made people profligate and instigate them to communicate with the discontented in the provinces.<sup>127</sup>

The sardars in the Deccan also criticised the addresses in a durbar held before Malcolm.<sup>128</sup> Basker Ram Gokla handed Malcolm a memorandum which expressed their apprehensions: The addresses might be believed in England as the genuine voice of all of the Indians, while they only represented the opinion of 'a few discontented men, perhaps, some impostors and intriguers, low associates of money usurers, or crafty emissaries of lawyers'. The sardars' honours and privileges would be easily taken away by 'a low man and bit of paper nobody can read' from the Supreme Court. The introduction of English law was contrary to the government's 1818 Satara proclamation and the 1827 Regulations. Therefore, 'the jurisdiction of the Supreme Court of Bombay may not be extended to this Province'. The memorandum was signed

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<sup>126</sup> BL, IOR L/PS/6/181, 969–80, BPC 29 Sep. 1830, no. 6, William Newnham, minute, 13 Sep. 1830.

<sup>127</sup> Ibid., 983–1029, J. Malcolm, minute, 16 Sep. 1830, BPC 29 Sep. 1830, no. 8.

<sup>128</sup> It was held on 17th September. Ibid., 923–39.

by 4 first class sardars, 8 second class including Pandoorung Ramchunder and Moro Ragonath, and other 200 sardars and merchants.<sup>129</sup> The governor had to issue a further notice criticising the addresses.<sup>130</sup>

The petitions by the sardars and the addresses of the merchants suggest that the case of Moro Ragonath was a moment of politicisation for the sardars and the Indian merchants. The sardars strengthened their affiliation with the government, and the merchants identified themselves with the King's Court. The backdrop of this sharp political divide between the two parties was the government's policy of indirect rule. In turn, the Moro Ragonath case necessitated the government to put further priority on the agrarian politics in the mofussil rather than the trade and commerce in the presidency town. The strong connection with the merchants observed in the eighteenth century was fading away, and the government's policy was more and more focused on security and revenue collection in the mofussil. In other words, the Moro Ragonath case facilitated the process of reorganisation of the political order of western India from a maritime commercial network of Indian merchants to the territorial domination of the British empire.

## VI. Conclusion

On 21 September 1830, in the midst of the commotion, Grant left Bombay for Calcutta.<sup>131</sup> The biggest conflict between the government and the King's Court in India was finally ended. The Moro Ragonath case gives us many insights into the nature of Bombay politics in the early nineteenth century.

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<sup>129</sup> Ibid., 923–39, BPC 29 Sep. 1830, nos. 21–4, J. Malcolm, minute, 18 Sep. 1830.

<sup>130</sup> Ibid., 943–5, Government notice, 27 Sep. 1830,

<sup>131</sup> Ibid., 1053–9, Gov. to CoD, 25 Oct. 1830.

First, jurisdictional jockeying by the Indians was quite common in Bombay in the 1820s. Both Pandoorung Ramchunder and the karkoons of Moro Ragonath well understood how to use the jurisdictional conflict between the government and the King's Court. They allied with the one to criticise the other and employed multiple means to make use of the conflict. The most immediately available ally for those resorting to the King's Court was the Bombay attorneys and their subordinates in the mofussil. They could mobilise their relatives and friends for making testimonies and writing affidavits. They also used the press to publish the addresses to the chief justice. In this sense, Moro Ragonath's karkoon followed these legal practices which were quite common in the Deccan. Those allied with the government, on the other hand, could demand it act against the court, chiefly by means of petitions, and in cases of sardars, at the durbar. This Indian agency was the origin of the conflict which, as we shall see, changed the overall structure of the imperial governance.

At the same time, the case clearly showed the process by which a local issue in a local province in India was transformed into an imperial agenda in Bombay, Calcutta, and London. The Moro Ragonath case was unique in this respect. The government sought support from the home authorities not only by means of usual departmental letters but also sent a special agent to convey all the information and opinion of the government. The London politicians such as Wellington and Ellenborough were well informed about the issue thanks to their private correspondence with Malcolm. The intensity of communications among the governments in India was also remarkable in this case. The Bombay government could obtain advice and supports from the governors, members of the council and the Advocate Generals in Calcutta and Madras by means of public and private correspondence. The chief justice, in addition to his regular communication with the President of the Board of Control, also

petitioned the Bengal government and sent a special mission to London to represent to the Privy Council. Their connection with the London radicals was especially important in this respect. The hub of such networks was the influential Europeans who were in Bombay and now back in Britain such as Charles Forbes and Robert Rickards. At the same time, it was clear that the government was in an advantageous position in utilising the established routes of communication than the King's Court which must rely on personal and ad-hoc networks. This difference of resources available from outside the presidency brought about the favourable outcome to the government.

It was also clearly shown, as in the cases discussed in Chapter 2, that the appeal structure of colonial judiciary had a tendency to work in favour of the government. That is, the independent judiciary in India could not ultimately fulfil its independence in the structure of empire, where the final decision was always retained in the politicians at home rather than the judges in India or in Britain. It means that, even if the law courts sometimes judged against the government, as in Bombay in the 1820s, the rule of law was structurally limited in the colonies. As we shall see in the next chapter, this structural limitation to the rule of law was further strengthened in the succeeding debates on the charter renewal in Calcutta and London. Because of the scale of conflict, the governments in Bombay, Calcutta and London had to realise the need to resolve this jurisdictional conflict and make a unified and hierarchical order of judicature in India. In that process, the Bombay government's discourse of crisis and danger was given an institutional form.

## Chapter 7: Legislative council—Bombay, Calcutta, London—

### I. Introduction

The East India Company's royal charter was to be renewed every twenty years. This was the occasion when the whole system of the Indian government was reviewed and revised. The coming renewal of 1834 was the opportunity for the Bombay government to settle the problem of the King's Court.<sup>1</sup> The logic of state necessity should be firmly established and the chiefs and sardars should be protected from the encroachment of the King's Court. This chapter assesses the extent to which the Bombay officials' vision of empire was realised in the charter renewal.

The reform of the Company's judicial administration, rather than the abolition of the China monopoly, was the central issue of this renewal. The abolition of monopoly was a consensus in Westminster, and the Company itself had admitted that it was unavoidable.<sup>2</sup> Thomas Macaulay gave scant attention to it in parliament, saying that 'No voice, I believe, has yet been raised in Parliament to support the monopoly. On that subject all public men of all parties seem to be agreed'.<sup>3</sup> Instead, the ministers and radicals discussed most of the time whether the expansion of the King's Court's jurisdiction was a blessing or an evil of the British colonialism. While the radicals advocated the constitutional check of the King's Court, the

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<sup>1</sup> Mithi Mukherjee's *India in the shadows of empire* does not pay attention to this charter renewal, which is highly relevant for her argument.

<sup>2</sup> Wilson, *History*, iii. 479–87; C. H. Philips, *The East India Company 1784–1834* (Manchester, 1961), 285–90; Ian Newbould, *Whiggery and reform 1830–41: The politics of government* (Basingstoke, 1990), 111–2.

<sup>3</sup> Parl. Debs. (series 3) vol. 19, col. 502 (10 July 1833), T. B. Macaulay, speech. Cf. Bowen, *Business of empire*, 296.

government urged the need of uniformity in judicial government. The most important consequence of this debate was the establishment of the first all-India legislative council. The debate on its establishment was crucially important in determining the future form of Indian governance especially in regard to the rule of law and its exceptions.

Eric Stokes in his *English utilitarians and India* (1959) argues that the 1834 charter was the product of amalgamation between utilitarianism of Mackenzie, Ross, Mill and Macaulay and paternalism of Elphinstone, Malcolm, Bentinck and Metcalfe.<sup>4</sup> This remains an important point. While the role of paternalism tends to be undervalued than that of utilitarianism,<sup>5</sup> we need to pay more attention to these paternalist governors, especially when we consider recent historians' call for paying more attention to the crisis in India than the metropolitan intellectual debate. For example, Jon Wilson argues that the legislative council was part of the government's struggle for a uniform, efficient and mechanical mode of governance which was required as a response to 'chaos and uncertainties of everyday colonial rule'.<sup>6</sup> As we have seen in previous chapters, a major cause of such chaos and uncertainty was the King's Court's jurisdictional expansion, which was vehemently opposed by the paternalist governors.

I argue that the debate on the legislative council was important as it institutionalised the Bombay government's paternalist logic of emergency and state necessity in the political structure of Britain's Indian empire. The idea of establishing the legislative council first appeared as a means to solve the conflict of authority between the government and the Supreme Court which

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<sup>4</sup> Stokes, *Utilitarians*, 182–3 and note P, 327.

<sup>5</sup> See, for example, Gauri Viswanathan, *Masks of conquest: Literary study and British rule in India* (New York, 1989).

<sup>6</sup> Wilson, *Domination of strangers*, 144–50.



was exposed in the Bombay case of Moro Ragonath. The charter limited the power of the King's Court and prescribed its subjugation to the governor general's legislature, and, by doing so, it realised the Bombay officials' aspiration for a more unitary and hierarchical form of authority in India. The following analysis shall make it clear that it was not the utilitarians and evangelicals in London such as Mill, Grant and Macaulay but the officials in Bombay and Calcutta such as Malcolm, Metcalfe and Bentinck who demanded and realised this crucial stipulation on the supremacy of the executive over the judiciary.

This chapter pays attention to the process through which the debates in Bombay and Calcutta determined the final form of the legislative council. As we shall see, they had different ideas on the problem of judicial systems and political authority in India, especially in regard to the status and socio-political role of the native aristocracy. Nonetheless, they were united in criticising the political interference by the King's Court. This was because they shared the sense of danger of the tribal raids and believed that the constitutional check by the judiciary should not hinder the government's power to employ necessary measures in times of emergency. They agreed that the political authority in India should be united in the hands of the government and that the King's Court should be subordinated to it. As a result, the power of judicial check against the government in India was officially abolished. This was a major constitutional change from the idea of Indian governance in the 1770s and 80s, when the Supreme Court was introduced for the very purpose of judicial check against the corruption and oppression by the Company officials. Now the British parliament made the Company the author of the law. The rule of law was replaced by the rule by law made by the government. This chapter traces the debate in India and at home through

which such a major constitutional change was devised without much difficulty.

## II. Conflict between the executive and the judiciary in Bengal

The new charter was the result of a convergence of different senses of danger in Bombay, Calcutta and London. First, we look at that in Calcutta. As we saw in Introduction, the Bengal government experienced a series of conflicts with the Supreme Court in the 1770s, which resulted in the Act of 1781. It is less known that the conflict did not cease there and intensified in the 1820s.<sup>7</sup> In 1820s Calcutta, the conflicts between the government and the King's Court were related to two issues. One was the King's Court's intervention in the local revenue administration, which was also disputed in Bombay. The other, which was not seen in Bombay, was that the King's Court had exacerbated the European settlers' violence in the mofussil. Engaging in these problems, the Bengal government developed its own sense of danger of the King's Court and realised the need of establishing the unitary and exclusive authority of the government in the mofussil.

The background to the government's sense of danger on the King's Court's revenue intervention was an unprecedented financial crisis in the 1820s. The urgent economical reform was necessitated by the huge debt incurred in the first Anglo-Burma war in 1824–6 as well as a more general price depression. In 1828/9, the accumulated debt of the Company amounted to £40 million.<sup>8</sup> Pressed by the home authorities, the Bengal government

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<sup>7</sup> Sinha briefly discusses it. Chittaranjan Sinha, *The Indian civil judiciary in making 1800–33* (New Delhi, 1971), 159–86.

<sup>8</sup> B. B. Misra, *Central administration of the East India Company 1773–1834* (Manchester, 1959), 55; Bayly, *Indian society*, 120–6.

appointed the Civil Finance Committee in 1827 in order to reduce the amount of expenditure to the level of 1823/4, or before the war.<sup>9</sup> A member of the governor-general's council Charles Metcalfe said that 'a very little mismanagement might accomplish our expulsion'.<sup>10</sup>

One of the key policies of the government to increase revenue was the promotion of European planters' land holding in the mofussil, and this was the focus of its conflict with the King's Court. Indigo was one of the most important commodities of the Bengal presidency in this period. The 1820s saw a great expansion of indigo cultivation underpinned by the EIC's large purchase. There were 1,600 planters in Calcutta in 1828, which was more than one fourth of the total white population in India, and they had more than 700 factories in 1830.<sup>11</sup> The planters were the agent of the agricultural improvement in collaboration with the new class of *bhadraloks* (merchant-zamindars) such as Dwarkanath Tagore and Rammohan Roy, who were aspiring to improve agriculture and industry.<sup>12</sup> In order to bring about the improvement, the contact with the European should be promoted, not hindered. The planters' social influence was widely felt throughout the presidency. They pressured the government to allow their land holding in the mofussil which was prohibited by the charter. The government was sympathetic to the planters and admitted concessions.<sup>13</sup> Bentinck was 'convinced that the development of the natural resources of the country depends mainly on the introduction of European capital and skill'.<sup>14</sup> Metcalfe

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<sup>9</sup> Misra, *Central administration*, 55–63.

<sup>10</sup> Quoted in Bayly, *Indian society*, 121.

<sup>11</sup> Marshall, *Bengal*, 108–9, 169.

<sup>12</sup> S. N. Mukherjee, 'Class, caste and politics in Calcutta'; Prakash Kumar, *Indigo plantations and science in colonial India* (Cambridge, 2012), 77–8.

<sup>13</sup> PP 1831–32 (734), Appendix V.

<sup>14</sup> PP 1831 (734), Appendix, 274, W. Bentinck, minute, 30 May 1829.

likewise stated that the abolition of restrictions of their land holding would promote 'the prosperity of our Indian empire' and progressively increase revenue.<sup>15</sup>

At the same time, the government's support for the indigo planters was a desperate response to the indigo depression at the beginning of the 1830s. When the charter renewal was debated in Bengal and in London, the indigo plantations in Bengal were about to collapse; the bankruptcy of the house of Palmer in January 1830 ushered a general downfall of the industry between 1830 and 1833, which destroyed all the agency houses in Bengal. The Bengal government tried its best to save the situation by strengthening the legal status of the planters with Regulation V of 1830, which allowed them to seize ryots' property in order to enforce contracts.<sup>16</sup>

The major obstacle was the dual jurisdiction of the Company's Court and the King's Court in the mofussil. European settlers' violence against Indians was exacerbated by their exemption from the Company's Court which, as Elizabeth Kolsky shows, became the major motive for the government's codification project.<sup>17</sup> An official report gave a detailed account of the problem.<sup>18</sup> First, in order to use the Company's Court to deal with cultivating ryots' various 'resistances',<sup>19</sup> it was conventional for the planters to hold land

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<sup>15</sup> Ibid., C. T. Metcalfe, minute, 19 Feb. 1829.

<sup>16</sup> Sugata Bose, *Peasant labour and colonial capital: Rural Bengal since 1770* (Cambridge, 1993), 49-50; Anthony Webster, *The twilight of the East India Company: The evolution of Anglo-Asian commerce and politics 1790-1860* (Woodbridge and Rochester, 2009), 84-94.

<sup>17</sup> Kolsky, *Colonial justice*, chapter 2.

<sup>18</sup> The report was titled 'Conduct of Europeans in India'. It was attached to the report of the Commons Select Committee of 1831/32 as General Appendix V. PP 1831-32 (734), Appendix, 343-80.

<sup>19</sup> There were four means of resistance (1) the ryots' breaching their contract [i.e. non-performance of their duty], (2) ryots' receiving advances from two planters, (3) their disputes on titles or boundaries of estates, and (4) destruction of indigo by trespass of cattle. PP 1831-32 (734), Appendix,

in their Indian servants' name. In consequence, the planters were virtually exempted from liability in the Company's Court, and they 'connive[d] at the misconduct of the servants in whose names his land is holden, towards the ryots and other natives'.<sup>20</sup> Against this background, the planters used the King's Court to evade the hands of the government's district officers. The magistrate of Dacca explained it as follows:

They may direct brigands to be entertained; they may plan and order attacks to be made; but if not personally present as principals, it is difficult to convict them of being accessories. Instances have occurred, in which the mere warning a European planter against being accessory to a breach of the peace, on the information of a police officer that armed men on his part were collected, has called forth a threat of prosecution in the Supreme Court; so that magistrates are really afraid to act against British subjects, except on the strongest grounds.<sup>21</sup>

In this way, the King's Court's criminal jurisdiction over Europeans in the mofussil exacerbated the planters' violence and oppression against Indian cultivators, which in turn raised the possibility of disturbance by the indigo cultivators. Worse, the contemporary pointed out that the impoverished peasants often converted themselves to the dacoits.<sup>22</sup> In order to solve these problems and to utilise the planters as the agent of agricultural improvement, the Bengal government had to deal with the jurisdictional problem of the King's Court. The Bombay government did not experience this problem, as there were virtually no Europeans who dared to repair to the mofussil other

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352–3.

<sup>20</sup> Ibid., 369.

<sup>21</sup> PP 1831–32 (734), Appendix, 370.

<sup>22</sup> A. F. Salahuddin Ahmed, *Social ideas and social change in Bengal 1818–1835* (2nd edn, Calcutta, 1976), 117–8.

than some agents of mercantile houses or lawyers.<sup>23</sup> White violence was not, however, the main point of jurisdictional conflict between the King's Court and the government in Bengal, for the judges of the King's Court also unanimously supported the government's plan to subject Europeans in the mofussil to the Company's Court.<sup>24</sup>

The real problem was that, in the late 1820s, the King's Court started to intervene more overtly in the government's revenue administration in the mofussil. The most disputed case was the case of *Chowdry v. Chowdry* in 1829, in which the Supreme Court decreed partition and re-assessment of a revenue defaulter's land and, in order to compel enforcement, attached the land and appointed an officer of the court as a receiver of the revenue.<sup>25</sup> This was followed by similar cases of partition of lands in the mofussil.<sup>26</sup> The government was concerned about the collision of authorities between the collectors and the Supreme Court, and the problems caused by the Supreme Court's awarding of lands without reference to the government records or support of the local officers.<sup>27</sup> But the judges vindicated their jurisdiction based on the doctrine of 'constructive inhabitancy', which assumed that those living or having offices in Calcutta were amenable to the King's Court even if the cases originated in the mofussil. Jon Wilson points out that the background of these cases was the changing pattern of the agrarian relationship, particularly the emergence of a *bhadralok* class living in Calcutta,

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<sup>23</sup> A rare case occurred in 1827 when one Maurice Foley was tried and acquitted by the Supreme Court for robbing the bullion chamber of the castle and later sent a notice of action to the district magistrate. MSA, GD, 1827, 20/153, 225–42.

<sup>24</sup> PP 1831 (320E), 112–3, Calcutta Supreme Court [hereafter Cal. SC] to Ben. Gov., 13 Sep. 1830 (no. 26), enclosure 2.

<sup>25</sup> PP 1830 (320E), nos. 1–8, 11; Sinha, *Indian civil judiciary*, 176–7.

<sup>26</sup> BL, IOR L/PJ/3/257, 1–29, Bengal Judicial Letter [hereafter Ben. JL], Ben. Gov. to CoD, 19 Apr. 1831.

<sup>27</sup> BL, IOR L/PJ/3/257, 6, 19–21, Ben. JL, Ben. Gov. to CoD, 19 Apr. 1831.

holding lands in the mofussil, and using the King's Court for managing their landed property.<sup>28</sup> From this perspective, the cases exhibited an alarming tendency for the government, as it meant that the bhadraloks could evade the government's control of mofussil lands by using the King's Court as another channel of land transactions. In this sense, the Bengal government's sense of crisis was similar to that of Bombay which we saw in Chapter 3. They both apprehended that the King's Court would curtail the government's exclusive control of revenue affairs. Reporting the cases to the Court of Directors, the government explained that

... our main object has been to retain in our own hands the entire control of the revenue arrangements in estates affected by decrees of the Supreme Court, ... we have especially guarded against the drawing of any inference which might imply an acquiescence on the part of government in the jurisdiction exercised by the Supreme Court over estates in the mofussil.<sup>29</sup>

This problem of the King's Court's revenue intervention should be put in a larger picture of the conflict between the executive and the judiciary in the Bengal mofussil. It was related to a prolonged conflict between the government and the zamindars over the revenue assessment and the resumption of rent-free lands. The government suspected that the zamindars appropriated the rents from the lands which were cultivated and added to their estate after the Permanent Settlement in 1793. In order to investigate the title of these lands, the government had issued several regulations, which were disputed by the zamindars. The most problematic issue for the zamindars was that the government gradually strengthened the power of the collectors to

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<sup>28</sup> Wilson, *Domination of strangers*, 146–7.

<sup>29</sup> BL, IOR L/PJ/3/257, 25–6, Ben. JL, Ben. Gov. to CoD, 19 Apr. 1831.

investigate and resume their lands. In the original settlement in 1793, the collectors had to make a suit in the Company's Court to dispute the doubtful titles. But Regulation IX of 1825 empowered the collectors to directly examine the titles of the lands, and Regulation III of 1828 appointed the special commissioners, in lieu of the ordinary court of law, to receive appeals from the decision of the collectors. This meant that the Bengal government put the affairs of the zamindar's rent-free land under its exclusive control. The zamindars criticised the arbitrariness of these measures by a series of petitions published in the press.<sup>30</sup>

The Bengal government could not admit that the judiciary became the rallying point of those who criticised the government. In reviewing the revenue and judicial administration of all the presidencies, Holt Mackenzie, the Bengal government's secretary to the Territorial Department in charge of all revenue matters, reached the following conclusion:

It seems to me that the theory of a complete separation between the judicial and executive authority, if elsewhere sound, is here misplaced. The judicial is the chief branch of the executive administration. Though in free countries it may belong to the people, in a despotism, it must belong to the ruler or his delegates; and to put judges arbitrarily over the people, whom the people cannot control, and to leave them uncontrolled, is to abandon the most sacred duty of supreme power.<sup>31</sup>

Considering this aspiration for the sovereign power in regard to revenue affairs, it was natural that the government strongly reacted to the King's Court's interference in the problem of land and revenue in the mofussil which enabled the *bhadralok's* jurisdictional jockeying.

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<sup>30</sup> Ahmed, *Social ideas and social change in Bengal*, 118–22; PP 1831–2 (735-III), 222, Mackenzie, evidence, 18 Apr. 1832.

<sup>31</sup> PP 1831–32 (734), 136, H. Mackenzie, minute, 1 Oct. 1830.



Furthermore, though small in number, more overt political interferences of the King's Court was resumed in this period. During the debate of the charter renewal, the Supreme Court at Calcutta maintained that it could take cognizance of a civil suit against the Company in *Bank of Bengal v. United Company* in 1831. The Company insisted that the conduct of the sovereign was not amenable to the civil court, but the Court held that the Company was not a sovereign, as 'the sovereign is the King of the United Kingdom'.<sup>32</sup>

We can add to these problems Bentinck's personal involvement in a conflict with the King's Court in 1805–7 as the governor of Madras. His government bypassed the Supreme Court and the JPs when it established a town police force. The chief justice Henry Gwillim repeatedly denounced the 'military despotism' of the government and its 'ill-advised young lord'. Rosselli analyses this affair as an expression of 'the resentment of private traders, shopkeepers, and other independent Europeans against the hardening of company rule'.<sup>33</sup> The structure of conflict was almost identical to that in Bombay in 1808–12, which we saw in Chapter 1.

But above all, what urged Calcutta to support the cause of the Bombay government was its own sense of crisis over the tribal raids in the presidency, which was exacerbated by its conflict with the judiciary or, in this case, the Company's Court. The fear of the raids was equally strong in Bengal as in Bombay in the early nineteenth century. Lord Minto who was the governor general between 1807–13 once stated that the 'dacoits' established 'the horrid ascendancy' and 'its sirdars, or captains of the band, were esteemed and even called the hakim or ruling power, while the real government did not possess

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<sup>32</sup> Jain, *Outlines*, 99.

<sup>33</sup> Rosselli, *Bentinck*, 309.

either authority or influence...'.<sup>34</sup> Particularly problematic were the gang robberies in the Ceded and Conquered Provinces, then called the Upper Provinces, which were adjacent to the Kingdom of Awadh and troubled by the raiders from there. The Bengal government enacted a series of regulations aiming at the suppression of gang robberies. By these regulations, the government gradually excluded the thugs and dacoits from the realm of ordinary criminal judicature and created a series of special stipulations only applicable to these robbers. Regulation III of 1805 and VIII of 1808 fixed additional exemplary punishments of the gangs. Regulation IX of 1808 stipulated that the government could proclaim rewards for their arrest. Regulation VIII of 1810 newly appointed the superintendent of the police for the Upper Provinces chiefly in view of suppressing robberies. Regulation III of 1821 empowered the native police officers to arrest 'suspicious' gangs.<sup>35</sup>

Bentinck's government set out a series of measures to deal with the problem. In 1829, the Bengal government started to carry out a series of anti-thuggee campaigns which relied on the working of the government's own magistracy rather than the sardars. As Kim Wagner and Tim Lloyd argue, these campaigns were permeated with the logic of exception, which was embodied in Bentinck's comment that the thugs 'may be considered like Pirates, to be placed without the pale of social law, and be subjected to condign punishment by whatever authority they may be seized and convicted'.<sup>36</sup> In addition to these campaigns, the government sought systematic solutions by placing these regions in a more immediate sphere of

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<sup>34</sup> The Countess of Minto, *Lord Minto in India: Life and letters 1807 to 1814* (London, 1880), 188, Lord Minto to Lady Minto, n.d.; Marshall, *Bengal*, 98.

<sup>35</sup> These regulations were summarised in PP 1831–32 (735-IV), app. 728–37.

<sup>36</sup> Wagner, *Thuggee*, 200, and Tim Lloyd, 'Thuggee, marginality and the state effect in colonial India circa 1770–1840', *IESHR*, 45, 2, (2008), 201–37. Quotation is from the latter at 216.

government influence. Bentinck and Metcalfe thought that the capital of the Bengal presidency should be moved to the Upper Provinces in order to enable ‘prompt and quick interposition of command ... in cases of emergency’.<sup>37</sup> Holt Mackenzie recommended creating a new, separate presidency of Agra, which enabled an easy access to ‘all points requiring prompt attention—the Sutlej frontier—Malwa and Rajputana—Bharatpur—Sindhia—Bhundelkhand—Rohilkhand’.<sup>38</sup> This idea was eventually realised in the 1834 chapter renewal in the form of the newly created Agra presidency. By these measures, the government tried to enable a more efficient suppression of the gang robbers.

But, the government’s operation against thuggee was frequently hindered by the judicial checks by the Company’s Court. As Radhika Singha points out, the government officers in charge of robbers often complained that the Company’s Court’s criminal procedures rather hindered effective policing. The paucity of evidence often prevented the conviction of the suspects. Magistrates could keep suspected thugs in confinement by taking a large amount of security, but they could be released by the Company’s Court. The government officials suggested that persons who were suspected to be ‘thugs by profession’ should be immediately arrested, but the Company’s Court rejected them as they would jeopardise uniformity of law and allow oppression by the police officers. The magistrates continued banishing entire communities on suspicion of being dacoity tribes, but the judges of the Company’s Court also continually stated that these acts were inadmissible.<sup>39</sup>

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<sup>37</sup> *Bentinck Correspondence*, ed. Philips, i. 285–6, W. Bentinck, minute, 16 Sep. 1829; *Ibid.*, 182, W. Bentinck, minute, 22 Feb 1830; *Ibid.*, 320, C. Metcalfe, minute, 11 Oct. 1829; *Ibid.*, 424–5, CoD to Ben. Gov. 6 Apr 1830.

<sup>38</sup> *Ibid.* 37, H. Mackenzie to W. Bentinck, 27 May 1828.

<sup>39</sup> Singha, *Despotism of law*, 194–9.

The judges said that these measures ‘certainly increase the evils which are experienced from the too extensive powers already vested in the officers of police without diminishing in any material degree the danger to which travellers are exposed from thugs’ and that the regulations should not be ‘an instrument of legalised oppression and extortion’ by the police.<sup>40</sup> In a different way, therefore, the Bengal government was also experiencing the problem of its relationship with the judiciary, which was crucially important for controlling raids and maintaining tranquillity in its vast inner territories especially in times of emergency. The Bengal government’s sense of danger might be strong, as the above example indicated that the judges of the Company’s Court as well as the King’s Court employed the logic of law. Calcutta could fully sympathise with Bombay’s difficulty in dealing with the raiders and the judiciary.

### III. Native aristocracy and security in central India

Although they were united in criticising the political encroachment of the judiciary—both the Company’s and the King’s—, there were also many differences between the Bombay and Bengal governments. In order to think about the making of the legislative council, it is necessary to look at their differing attitude towards the role of native aristocracy in the mofussil. As we saw above, the King’s Court’s interference in the affairs of sardars was not disputed in Bengal in the 1820s. This was because the government did not rely on the zamindars in suppressing the raids in the same way the Bombay

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<sup>40</sup> BL, IOR P/139/15, Bengal Criminal and Judicial Proceeding, Western Provinces, 22 May 1828, no. 5, Nizamat Adalat to Ben. Gov., 22 May 1828, no. 5.

government did. Since the lapsing of the Nizamat and its replacement with European magistrates and Indian darogahs by Cornwallis in 1792, the Bengal government had disbanded the force of zamindars and absolved them from any police duties.<sup>41</sup> The succeeding governments followed the suit, thinking that relying on zamindars was ‘unsafe and inexpedient’.<sup>42</sup> Deprived of physical force, zamindars also tried not to incur any responsibility of suppressing robberies.<sup>43</sup> Bentinck and other officials were rather critical of zamindars who often harboured thugs and dacoits rather than help government to arrest them.<sup>44</sup>

This attitude of the Bengal government reflected a rapid decline of the social influence of zamindars in Bengal in the late eighteenth and early nineteenth centuries. Already under the Company’s rule for more than 50 years, the social influence of Bengal’s hereditary zamindars was much more weakened than in Bombay by this time. The decline of old aristocracy was already remarkable in the 1770s, and their demilitarisation was complete by the 1790s except at frontier regions.<sup>45</sup> As P. J. Marshal shows, they ‘passed from being great territorial magnates who effectively enforced their own law to being men who exercised certain rights defined by a law that was both laid

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<sup>41</sup> Marshall, *Bengal*, 130.

<sup>42</sup> The Marquis of Hastings endorsed the policy of not employing zamindars in their estates in 1815. The phrase quoted was made by Lord Amherst in 1827. PP 1831–32 (735-IV), Appendix, 257–64, Ben. JL, Ben. Gov. to CoD, 22 Feb. 1827.

<sup>43</sup> Ratnalekha Ray, *Change in Bengal Agrarian Society c.1760–1850* (Delhi, 1979), 84–5, 98.

<sup>44</sup> For Bentinck’s hostility towards petty chiefs (poligars) of hill regions in Orissa and Andhra, see Rosselli, *Bentinck*, 137. For zamindars’ protection of the dacoits and thugs, see Wagner, *Thuggee*. For an example from late eighteenth century, see James Westland, *A report of the district of Jessore: Its antiquities, its history and its commerce* (Calcutta, 1871), 77–9; Marshall, *Bengal*, 129. Regulation IX of 1808 and Regulation VI of 1810 stipulated the punishment of such zamindars who concealed the persons or information of dacoits.

<sup>45</sup> W. W. Hunter, *The annals of rural Bengal* (London, 1886), 56–8.

down and enforced from above'.<sup>46</sup> As S. N. Mukherjee points out, they were being replaced by the *bhadraloks*, who were vocal in demanding rule of law and security of property but fundamentally establishmentarian in their political outlook.<sup>47</sup> In the mofussil, the decline of lesser gentry continued throughout the nineteenth century.<sup>48</sup>

Accordingly, even Thomas Herbert Maddock, the Agent of Sagar and Narbada, the regions haunted by the thuggee, did not see any benefit of conciliating the chiefs. He referred to Bundelkhand in the Conquered Provinces as his example where the government's conciliatory policy generated no benefit. Maddock complained that the chiefs of that rich region which could procure more than a crore of rupees but contributed no man or penny to the government. He concluded that the government could 'in case of need ... derive little or no advantage from the undisciplined rabble'.<sup>49</sup>

This did not mean that the Bengal government did not pay attention to the native aristocracy. The difference was that Calcutta was chiefly interested in zamindar's economic role in society, while Bombay was more emphatic about their political influence. Maddock, in the same report, clearly stated that the lapsed enam lands should be used 'to form a native aristocracy more attached than the present race of jagheerdars to our Government, more dependent on its prosperity, better calculated to support it, and which will be more likely to conciliate our subjects, and benefit them by its disbursement'.<sup>50</sup> This indicates that Maddock wished to encourage the Bengal *bhadraloks*

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<sup>46</sup> Marshall, *Bengal*, 139.

<sup>47</sup> S. N. Mukherjee, 'Class, caste and politics in Calcutta'.

<sup>48</sup> See Stokes's example of Bundelkhand. Stokes, *Peasant and the raj*, 83–6. And see Conclusion below.

<sup>49</sup> PP 1831–32 (735-III), Appendix, 548–51, T. H. Maddock, minute, 17 Nov. 1828.

<sup>50</sup> Ibid.

mode of mofussil land management which was, as Jon Wilson argues, conducive to 'the rule-based form of governance' introduced by the Company rather than the old mode of politics based on patronage and network.<sup>51</sup>

Maddock also commented that the new aristocracy would be better than the present petty chiefs in Sagar and Narbada, who were treated as foreign princes and in consequence 'absolved' from having allegiance to the British government. They should rather be regarded as domestic subjects.<sup>52</sup> Here the relationship between the government and the local chiefs was treated as a domestic, not foreign, issue, and the chief's resistance was dealt with as a matter of police rather than that of war and diplomacy.<sup>53</sup> By replacing the old hereditary sardars with the new ones, the Bengal government tried to domesticate its relationship with the sardars and to exercise its exclusive sovereignty over these chiefs. This conscious remaking of the native aristocracy foreshadowed the aspiration for social engineering by means of law which was a marked feature of the Indian 'age of reform' in the 1830s and 40s.

#### IV. Calcutta debate on emergency

What should be emphasised is that, despite this difference of opinions about the desirability of European settlement or the relationship between the sardars, tribes and sovereignty, both the Bombay and the Bengal governments were

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<sup>51</sup> Wilson, *Domination of strangers*, 172–3.

<sup>52</sup> PP 1831–32 (735-III), Appendix, 548–51, T. H. Maddock, minute, 17 Nov. 1828.

<sup>53</sup> Lisa Ford shows that the similar change of relationship between the government and the local magnates happened in the United States and in New South Wales. Lisa Ford, *Settler sovereignty: Jurisdiction and indigenous people in America and Australia 1788–1836* (Cambridge, Mass, 2010).

convinced that the King's Court's expansion of jurisdiction in the mofussil should be limited and the hindrance of the judiciary to the executive should be removed. In order to look at how it was done, and how some of the concerns of each government were adopted or discarded, we now turn our attention to the government's discussion on the legislative council. In their discussion with the judges, the Bengal officials agreed with the view of Bombay on the need of limiting the power of the judiciary and vehemently defended their power of emergency intervention.

Charles Theophilus Metcalfe, a member of the governor general's council, was the central figure in this dispute. He frequently corresponded with Malcolm during the Bombay habeas corpus crisis in 1828 and 1829. He could fully sympathise with Malcolm's sense of danger as an enlightened soldier-administrator of the Munro school with ample experience in dealing with predatory tribes as the Resident of Delhi (1811–9, 1825–7) and Hyderabad (1820–5).<sup>54</sup> He also recognised the need to have 'an influential portion of the population attached to our Government by common interests and sympathies'.<sup>55</sup> His sense of danger was fully expressed in his minute in 1829. It examined several legal cases including *Chowdry v. Chowdry* in which the King's Courts committed the jurisdictional encroachment. It expressed Calcutta's concern about the sovereignty and revenue:

the sovereign acts of the Government in the disposal of its public Revenue beyond the limits of the Court's local jurisdiction, being once rendered liable to subversion by the fiat of the Court, no security for the

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<sup>54</sup> C. A. Bayly, 'Metcalfe, Charles Theophilus, Baron Metcalfe (1785–1846)', *ODNB*; online edn, Jan 2008 [<http://www.oxforddnb.com/view/article/18617>, accessed 23 Jan 2016]; John William Kaye, *The life and correspondence of Charles, Lord Metcalfe*, 2 vols. (London, 1858), i. 433, C. T. Metcalfe, minute, [1818].

<sup>55</sup> PP 1831 (734), Appendix, 274, C. T. Metcalfe, minute, 19 Feb. 1829.



Revenue or for the possession of India would remain.<sup>56</sup>

Metcalfe wrote another minute specifically examining the habeas corpus cases in Bombay, in which he stated that the ‘Legislature cannot have intended that the King’s Courts should throw open all the provincial gaols, and release all the prisoners sentenced by the Company’s Courts; and it is quite clear that the exercise of such a power would effectually destroy good order in the Company’s territories, and render its Courts utterly useless and contemptible’.<sup>57</sup>

The Bengal government found the solution in the British political tradition of parliamentary sovereignty. Mackenzie proposed it in his memorandum on the case of *Chowdry v. Chowdry*, and Bentinck and Metcalfe approved it.<sup>58</sup> The key to their argument was that the local government representing the legislative power of the sovereign monarch should be supreme in its relation with the judiciary.<sup>59</sup> They proposed that the governor general should be vested with an all-India legislative power in the form of the legislative council, whose law bound the King’s Court. In order to prevent future conflicts, the members of the council should include the Supreme Court judges as well as the governor general and the council. Enclosing these minutes, the government requested the judges of the Calcutta Supreme Court to draft the bill for establishing the legislative council.<sup>60</sup>

The proposal reflected the Bengal government’s strong aspiration for what Metcalfe called ‘the principle of unity of command’. Besides the

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<sup>56</sup> PP 1831 (320E), 13–15, Bengal Secret Consultations, C. T. Metcalfe, minute, 15 Apr. 1829.

<sup>57</sup> Ibid., 25–6, C. T. Metcalfe, minute, 2 May 1829.

<sup>58</sup> Ibid., 30–1, H. Mackenzie, note, n. d.

<sup>59</sup> Ibid., 13, C. T. Metcalfe, minute, 2 May 1829.

<sup>60</sup> Ibid., 1–3, Ben. Gov. to Cal. SC, 14 July 1829.

subjugation of the Supreme Court to the governor general, Metcalfe suggested combining the commander in chief and the governor general, unifying the armies of three presidencies into one, and unifying the civil services of different presidencies in the new charter.<sup>61</sup> Among such measures, unifying the judiciary into the executive was one of the most important. In 1829, the Bengal government abolished the circuit courts, divided the presidency into twenty small districts and appointed a Commissioner of Revenue and Circuit in each district vested with revenue, criminal and police jurisdictions.<sup>62</sup> The government also newly appointed the collector-magistrates combining the duty of the collectors and the magistrates in the mofussil and strengthened their power of summary justice, provoking the home authorities' censure.<sup>63</sup>

The judges of the Calcutta Supreme Court strongly reacted against the government's censure. They were particularly critical of Metcalfe's minutes. They vindicated the court's conduct in the cases such as *Chowdry v. Chowdry* and justified their jurisdiction in the mofussil based on the doctrine of constructive inhabitancy. Charles Edward Grey, the chief justice, sarcastically stated that 'it may be worth while to consider whether it is the Court which sets at naught the Regulations of the Government, or the Government which has forgotten the lawful powers of the Court'.<sup>64</sup> John Franks, the puisne judge, also supported the expansion of the court's jurisdiction and positively advocated the plurality of jurisdictions in the mofussil by arguing that overlapping jurisdictions of various courts caused no inconvenience in

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<sup>61</sup> D. N. Panigrahi, *Charles Metcalfe in India: Ideas and administration 1806–1835* (Delhi, 1968), 160–2.

<sup>62</sup> This did not work well, and, two years later, the duty of the circuits was transferred to the newly appointed sessions judges; later, the task was further transferred to the district judges of the district and sessions courts. Jain, *Outlines*, 180–2; Stokes, *Utilitarians*, 151–5.

<sup>63</sup> Jain, *Outlines*, 182, 187–8; Stokes, *Utilitarians*, 163–5.

<sup>64</sup> PP 1831 (320E), 62, Charles Edward Grey, minute, 2 Oct. 1829

Britain.<sup>65</sup>

The Calcutta judges, following the Bombay judges' opinion in the case of Moro Ragonath as well as that of Amerchund Bedreechund, strongly criticised the government's attempt to normalise the state of exception and emergency. Edward Ryan, the puisne judge, called Metcalfe's minute as '*legal hocus pocus, or legal legerdemain*' and criticised his intention as follows:

I do not mean to say that some great question of state necessity or expediency may not make it incumbent on the Government to interpose its authority, and to prevent the law taking its course; but these emergencies are of rare occurrence, and are of course only to be justified by the particular circumstances of the case.<sup>66</sup>

The judges criticised, as John Peter Grant did, the government's despotism and asserted that it was not the EIC but the King's Court that represented the sovereignty of the British monarch. Their claim was based on the assumption that there were only the executive and the judiciary in India, and the cause of the problem was the former's encroachment of the latter. Grey stated that Metcalfe's minute was aimed at regularising the government's interference to annul the judgements of the court which were already given. It was to 'make the sovereignty of the King in Parliament only nominal in India, and that there shall be no law there which is not liable to be altered by the executive branch'. The King's Courts, the only courts to which the servants of the Company were amenable, was to be succumbed to the Company, and 'the Company and their servants would at once be sovereigns in India in all but the name and the right, and sovereigns uncontrolled by law'.<sup>67</sup> Grey proposed

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<sup>65</sup> Ibid., 84, John Franks, minute, 23 Sep. 1829.

<sup>66</sup> Ibid., 90, 93, Edward Ryan, minute, 2 Oct. 1829.

<sup>67</sup> Ibid., 74–5, C. E. Grey, minute, 2 Oct. 1829.

that the judges should retain the power to veto legislation and that the legislative council should be placed under the control of the crown and parliament rather than the East India Company.<sup>68</sup> With these critical comments and proposals, the judges sent the draft of the bill to the Bengal government.

The government officials were dissatisfied with the judges' attitudes. Particularly, they were determined to defend the power of discretion in times of emergency. Their subsequent exchange centred on the governor general's power to emergency legislation. Bentinck proposed inserting the following phrase in the bill:

Provided, however, that it shall and may be lawful for the Governor General in Council to carry on any cases in which he may consider that serious mischief to the interests of the British Government would arise from the suspension of any law, to cause the same to be carried immediately into effect, ... In all such cases, where any law or regulation may be passed on the emergency above adverted to, [a written notice should be sent to the judges and the Governor General should explain] the grounds of the existing emergency.<sup>69</sup>

The judges objected to the amendment as it would give unrestricted power of emergency legislation to the governor general,<sup>70</sup> but the government was adamant on this point and further proposed that the governor general could have the power to pass any laws without sending it round to other members or publishing it, when 'in the judgement of the Governor General, the safety and tranquillity of the British possessions in India, or the public interest' required

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<sup>68</sup> Ibid., 58.

<sup>69</sup> Ibid., 141, Ben. Gov. to Cal. SC, 28 Sep. 1830.

<sup>70</sup> Ibid., 150, Cal. SC to Ben. Gov., 7 Oct. 1830.

to do so.<sup>71</sup> The judges grudgingly wrote an amended bill, but they deleted all instances of the word ‘emergency’ from it.<sup>72</sup>

This battle over the word ‘emergency’ signifies that the judges’ conception of Indian society was different from that of the government. As we have seen throughout this thesis, the government officials conceived that Indian society was always in a state of crisis and emergency. On the other hand, the judges’ view was that Indian society was in a state of peace, in which all civil and criminal judicatures should be governed by the ordinary courts of law. They always assumed the predominance of the civil over the political and the military. They did not deny the state of crisis which required emergency measures, but they assumed that such cases of emergency were rare. Because of this fundamental difference of assumption, the government and the judges could not reach a compromise. The settlement of the conflict between the logic of law and the logic of emergency was brought over to the London debate.

#### V. London debate on imperial constitution

When the constitution of the legislative council was discussed in Calcutta, London was in a commotion over the emancipation of the Catholics and the reform of parliament. Due to these pressing political agendas, the discussion of the charter of the East India Company was delayed for several years.<sup>73</sup> The

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<sup>71</sup> Ibid., 151, Ben. Gov. to Cal. SC, 11 Oct. 1830.

<sup>72</sup> Ibid., 155, 157, Cal. SC to Ben. Gov., 13 Oct. 1830.

<sup>73</sup> In 1829, the Whig opposition made a motion to appoint a select committee for the inquiry of the Indian affairs. In February 1830, the select committees of both Houses were appointed, which was interrupted by the change of ministry in the same year. In February 1831, the Commons select committee was reappointed and reconstituted, but again the parliament was dissolved in April due to the Reform Bill debate. Then, finally, the committee which was

London debate can be divided into two periods. One was between 1830 and 1831, when the Bombay dispute over habeas corpus became the main topic, and the other was the subsequent debate in 1832 and 1833, which was centred on Calcutta's proposal of a legislative council. Historians often only focus on the debate in 1832 and 1833 and especially on Macaulay's celebrated speech in the Commons on 10 July 1833, but I would argue that the earlier debate in 1830 and 1831 was more important in determining the political character of the 1834 charter.

The case of Moro Ragonath was a fit example for the radicals to criticise. In February 1830, the radicals used the letter of Ellenborough on the appointment of Dewar to censure the government's dangerous attack on 'the independence of the judicial order in India'.<sup>74</sup> A whig leader Henry Brougham argued that the letter threw doubt on Ellenborough's qualification as the President of the Board of Control. Radical Joseph Hume lamented that 'the confidence of the natives was destroyed, and the letter of the noble lord had spread dismay throughout the whole of Bombay'. James Mackintosh condemned that the administration of justice should not be treated 'with such scornful negligence'. Secretary Peel and other ministers could only reply that Ellenborough's qualification should not be judged from such private and confidential communication.<sup>75</sup>

Ellenborough himself responded to the criticism in the House of Lords with a clear logic of state necessity, and the battle between the logic of law and that of state necessity was rehearsed in the British parliament.

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reappointed for the fourth time in January 1832 made a substantial hearing of evidence. Philips, *East India Company*, 287.

<sup>74</sup> Malcolm explained that it was either stole or obtained through breach of confidence. BL, IOR H/734, 675–6, J. Malcolm to S. R. Lushington, 2 Aug. 1829.

<sup>75</sup> Parl. Debs. (series 2) vol. 22, cols 124–33 (5 Feb. 1830).

Ellenborough argued that it was not the matter of the judiciary's independence but that of the usurpation of powers by the judge. He was fully supported by the Duke of Wellington and other Tories. One of them, Lord Melville, even totally denied the independence of the judges: 'the Judges of this country must not show their independence when they went to India; they must be careful not to commit the Governor; they ... must not set up their own notions of law'.<sup>76</sup>

The discussion quickly developed into a total inquiry into the cases of habeas corpus in Bombay. In the Commons, John Stewart, a protégé of the radical MP Charles Forbes, read the Bombay government's letter to the Supreme Court on 3 October 1828 and criticised the decision of the Privy Council in favour of the government. He made a motion to inquire into the conduct of the Bombay government against the Supreme Court, because, he said, if the interference would be admitted in India, it would soon be attempted in Britain as well.<sup>77</sup> Daniel O'Connell contrasted 'the authority of law and the constitution' and 'the power of the Governor' and stated that '[a]t any rate, the Governor ought not to be placed, like a dictator, above the Court, with power to control its proceedings, and decide what was legal for it to perform, and what not'. Hume said that the government's intervention in the case of Moro Ragonath was 'uncalled for by any exigency'. On the other hand, Malcolm was defended by Tories such as Lord Ashley, who repeated Malcolm's argument of state necessity almost verbatim. Peel expressed his decisive support for Malcolm and Ellenborough by stating that 'this was not a case affecting their independence, but a question relating to the assumption of

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<sup>76</sup> Parl. Debs. (series 2) vol. 22, cols 248–64 (9 Feb. 1830).

<sup>77</sup> Imperial moral contagion of metropole was a famous rhetoric of the critics of empire. See Deana Heath, *Purifying empire: Obscenity and the politics of moral regulation in Britain, India and Australia* (Cambridge, 2010).

authority unwarrantable and dangerous' and that the parliament should devise a remedy to such cases. The House was divided, and the motion was rejected by a majority of 106 to 15.<sup>78</sup>

This debate on the case of Moro Ragonath determined the framework of the following debates in select committees appointed for thinking about the affairs of the East India Company. The first committee was appointed by the Lords in early 1830. The debate in the committee was dominated by the concern of Ellenborough and Wellington. Not surprisingly, they chose Elphinstone and Chaplin, now both at home, as witnesses.

Elphinstone and Chaplin repeated their opinion that the King's Court's extended jurisdiction hindered revenue and judicial administration in the mofussil and injured the respectability of the chiefs and sardars. Based on his experience, especially in his involvement in the Amerchund Bedreechund case, Elphinstone urged that public servants should be exempted from the prosecution in the King's Court and that the governor and the council should not be summoned as witnesses or as jurors. The Supreme Court should not be allowed to pretend that it solely represented the king; the governor should have a commission from the king as well as from the Company. Many inconveniences were caused by the King's Court's power to veto regulations.<sup>79</sup> Chaplin pointed out that the government's conciliation policy towards the sardars was violated by the summons from the Supreme Court.<sup>80</sup> The government should have an entire control over the Europeans in the mofussil, or 'otherwise they will bring the government into constant collision with the courts of judicature at the presidencies' which would degrade the

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<sup>78</sup> Parl. Debs. (series 2) vol. 22, cols 1292–1304 (4 Mar. 1830); Parl. Debs. (series 2) vol. 22, cols 1370–1393 (8 Mar. 1830).

<sup>79</sup> PP 1830 (646), 163, M. Elphinstone, evidence, 25 Mar. 1830.

<sup>80</sup> Ibid., 179, W. Chaplin, evidence, 30 Mar. 1830.



dignity of both the government and the court.<sup>81</sup> The poor Europeans would produce general hostility among the Indians and ultimately ‘at no distant period lead to the total overthrow of our government’.<sup>82</sup>

The opposition to the government’s view was feeble. The Lords’ committee also summoned the former judges of the King’s Court in India, but their voices were discordant. On the one hand, Edward East, the former chief justice at Calcutta, vindicated the conduct of the King’s Court. The doctrine of constructive inhabitancy was justifiable by referring to numerous cases of equity filed by the Indians living in Calcutta, who ‘considered it a very great advantage to them to have both their persons and property under the judgement of the Supreme Court’. The Indians wanted extended civil and criminal jurisdiction of the King’s Court in the provinces.<sup>83</sup> On the other hand, Ralph Rice, the former Bombay judge who had experienced a series of conflicts with Edward West and Charles Chambers, avoided taking a clear stance on the issue. The former Ceylon judge Alexander Johnstone, while vindicated the working of the King’s Court in the island, did not give a decisive support to the expansion of jurisdiction in mainland India.<sup>84</sup> The former Madras judge, Thomas Strange, decidedly opposed the expansion of the King’s Court in the provinces, as he thought that the Europeans and the Indians should not be amenable to the same law.<sup>85</sup>

In the next year, the voice in support of the King’s Court was further weakened in the inquiry in the Commons’ committee. The advocates of the King’s Court were virtually absent in the witnesses. The radicals such as

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<sup>81</sup> Ibid., 186.

<sup>82</sup> Ibid., 185.

<sup>83</sup> Ibid., 79–83, Edward East, evidence, 9 Mar. 1830.

<sup>84</sup> Ibid., 120–37, Alexander Johnston, evidence, 19 Mar. 1830.

<sup>85</sup> Ibid., 263, Thomas Strange, evidence, 11 May 1830.

Robert Rickards and Charles Forbes were only questioned about free trade and could not express their opinion on the judicial administration. The only favourable voice could be found in Rammohan Roy's answer to the Board's inquiry. He commented that the present judicial system was inadequate to control the European settlers in the mofussil, and the extension of jurisdiction of the King's Court would be beneficial for that purpose, given the cost of suits would be lowered.<sup>86</sup> On the other hand, the government side was further strengthened by evidence of Chaplin and General Lionel Smith.<sup>87</sup> Referring to the cases of Amerchund Bedreechund and Moro Ragonath, Smith criticised the King's Court's judges for not considering the 'political circumstances'; their summons of the chiefs in the Deccan would disturb the country and lead to the 'rebellion'.<sup>88</sup> In this way, chiefly by the input from the former Bombay officials, the Bombay government's sense of crisis and its negative opinion on the working of the King's Court dominated the committees by the end of 1831. They formed the basis on which the subsequent debate was conducted.

In terms of volume of evidence, the first substantial inquiry was conducted only in another Commons' committee appointed in January 1832. It was subdivided into six branches (public, financial, revenue, judicial, military and political and foreign). The King's Court's jurisdiction was discussed in the public and the judicial branches.<sup>89</sup> By this stage, the plan of the Bengal government about the legislative council was printed and distributed, and the

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<sup>86</sup> PP 1831 (320A), 722, Rammohan Roy to BoC, n.d.

<sup>87</sup> Smith was subjected to John Peter Grant's bitter criticism during the Bombay controversy of the case of Moro Ragonath.

<sup>88</sup> PP 1831 (320A), 544, 547, Lionel Smith, evidence, 6 Oct. 1831. Smith added that the peshwa's money under Narroba should be confiscated as early as possible because 'it was apprehended unless it was surrendered we should never be quiet; that they would be able to keep up little predatory parties'. Ibid., 544.

<sup>89</sup> Public is in PP 1831–32 (735-I) and Judicial in PP 1831–32 (735-IV).

committee started to discuss it. As the consequence, the focus of the debate shifted from Bombay's concern about the native aristocracy to Calcutta's economic perspective on the issue of the King's Court.

The fall of Wellington and the appointment of Grey's reform ministry influenced the above shift of emphasis. The first Lords' Committee in 1830 was appointed under the Wellington government and thus naturally inclined to choose those who were critical of the King's Court as its witnesses. The sense of crisis of Malcolm and Ellenborough was fully attended to in the inquiry. In addition, Bentinck, a Canningite, was disliked by Wellington.<sup>90</sup> But the new president of the Board of Control, Charles Grant, was much more inclined to the reform and improvement of the Company's Indian government, and especially his friendship with Bentinck and Macaulay (both evangelical politicians) was crucial in shifting the emphasis of debate. Now the concern of Calcutta began to be heard, and their proposal of the legislative council became the main topic of inquiry.

But Bombay's sense of crisis on the King's Court's political danger was occasionally expressed in the committee. Malcolm's minute contained in the military department's volume touched the King's Court's jurisdiction.<sup>91</sup> In the political and foreign committee Malcolm repeated that he 'apprehended much danger from the extinction of the higher classes' as they 'absorb[ed] many elements of sedition and rebellion which ... must come into action if their power was extinct'.<sup>92</sup> The Bombay officials sought to persuade the politicians and the public about their points by printing pamphlets. Malcolm's *Government of India* (1833) was one such example, which contained John

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<sup>90</sup> Rosselli, *Bentinck*, 66–78.

<sup>91</sup> PP 1831–32 (735-IV), 519, J. Malcolm, minute, 10 Nov. 1830.

<sup>92</sup> PP 1831–32 (735-VI), 30, J. Malcolm, evidence, 12 Apr. 1832.

Peter Grant's petition to the Privy Council and his minute rebutting it as its Appendix. Elphinstone and Grant Duff encouraged John Clunes, a military officer at Baroda and an anonymous author of *An account of the Pindaris* (1818), to write and publish *A historical sketch of the princes of India* in 1833, which gave a detailed account of major princes, chiefs and sardars in India.<sup>93</sup>

Moreover, in the committees' inquiry, Bombay's concern about the King's Court's injurious effect was fully attended to by a prominent witness: James Mill. His liberal authoritarianism well resonated with the Bombay government's fear that the King's Court weakened the authority of the EIC's government in India. He was extensively examined by the public and judicial committees and had a definitive influence on the final shape of the legislative council. Mill, the examiner of the East India Company, advocated the Bombay government's call for a strong and unified authority and supported the idea of the legislative council, as the 'prestige' of the government was necessary. The 'obedience has to be compelled' in India, and the government could not protect Indians without 'the command of obedience', but the Supreme Court's resistance against the government was generating 'the habit and contemplation of disobedience'.<sup>94</sup> The Bengal government's proposal to include the judges of the King's Courts was objectionable, for they 'would overrule the members of council ... and become sole legislators, making the laws which they themselves administer, and ... rendered political organs, rather than what they ought to be exclusively, instruments for the distribution of justice'.<sup>95</sup> The Indians believed in the Supreme Court's power to check the

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<sup>93</sup> John Clunes, *An historical sketch of the princes of India: stipendiary, subsidiary, protected, tributary, and feudatory, with a sketch of the origin and progress of British power in India* (Edinburgh, 1833).

<sup>94</sup> PP 1831–32 (735-I), 49–50, J. Mill, evidence, 21 Feb. 1832.

<sup>95</sup> Ibid., 46, James Mill, evidence, 21 Feb. 1832.

government because they thought that the Supreme Court was superior to the government, which was ‘altogether evil, and of great magnitude’:

The existence of a double authority in the same country of two independent authorities, can never lead to good, must always act unfavourably on the willing obedience of the people, which is the strong arm of the government. It never can be reconciled to common sense, that an authority should exist in any country pretending to be superior to that government to which all must pay obedience, and to which all look up for protection. I think therefore, the existence of courts upon a footing different from the will of the government of the country, is altogether to be avoided ....<sup>96</sup>

Mill’s argument overweighed other authorities who opposed the legislative council such as Peter Auber, T. P. Courtenay, and N. B. Edmondstone.<sup>97</sup> The Board of Control made the plan and proposed it to the Court of Directors. The Board took initiative in the following negotiation with the Court.<sup>98</sup> Only two, Robert Jenkins and Henry St. George Tucker, out of 24 directors opposed it.<sup>99</sup>

The final form of legislative council was decided in the debates in the British parliament in June and July 1833. The outline of the East India Charter Bill was explained by Charles Grant. He agreed with the Calcutta government to argue that the legislative council was necessary to admit the free entrance of Europeans in India, which would bring about the agricultural as well as moral improvement in the country. He quoted at length from Calcutta

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<sup>96</sup> PP 1831–32 (735-IV), 120, J. Mill, evidence, 29 June 1832.

<sup>97</sup> PP 1831–32 (735-I).

<sup>98</sup> As Philips and Bowen have pointed out, since the appointment of Ellenborough under the Wellington administration in 1828, the Court of Directors had become completely dependent on the decision of the Board of Control. Philips, *East India Company*, 261–98; Bowen, *Business of empire*, 78–83.

<sup>99</sup> *Papers respecting the negotiation with His Majesty’s ministers on the subject of the East-India Company’s charter and the government of His Majesty’s Indian territories* ... (London, 1833), 123, 345, 362, 472.

authorities—Bentinck, Metcalfe, Bayley, Mackenzie and Judge Ryan—to show that they were in favour of admitting Europeans in the mofussil if they were subjected to the Company's Courts.<sup>100</sup> Grant also fully attended to Bombay's sense of crisis. He was determined to reduce the power of the King's Court. Calcutta's original proposal to include the judges in the legislative council was bluntly declined. Instead, he chose to deal with the problem of jurisdiction by giving 'considerable power' to the governor general 'to restrict the powers of the Supreme Court'. Grant approved the logic of emergency: '[t]his was certainly intrusting great power in the hands of the Governor General, but the urgency of the case demanded such a proposition, and on this ground he submitted it'.<sup>101</sup> Grant further proposed that a Law Commission should be appointed 'to inquire how far it was possible to approach to a more uniform system—how far it was possible to blend the King's Courts and those of the Company, and to amalgamate all systems...'.<sup>102</sup>

In the second reading of the bill, Thomas Babington Macaulay, the Secretary to the Board of Control, further expressed the ministers' determination to curtail the power of the King's Court.<sup>103</sup> He urged 'that the regulations of the Government shall bind the King's Court as they bind all other Courts', and that the King's Court's power to veto legislation should be abolished.<sup>104</sup> For Macaulay, the cases of habeas corpus in Bombay indicated the need of a systematic solution: 'The device of putting one wild elephant between two tame ones was ingenious; but it may not always be practicable.

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<sup>100</sup> Parl. Debs. (series 3) vol. 18, cols 730–8 (13 June 1833).

<sup>101</sup> Ibid., 736–7.

<sup>102</sup> Ibid., 739.

<sup>103</sup> Despite his friendship with Judge Ryan: Stokes, *Utilitarians*, 214; Lord Macaulay's *legislative minutes*, ed. C. D. Dharker (Madras, 1946), 199.

<sup>104</sup> Parl. Debs. (series 3) vol. 19, cols 527–8 (10 July 1833).

Suppose a tame elephant between two wild ones, or suppose, that the whole herd should run wild together'.<sup>105</sup> The reform was necessary as the European land holding in the mofussil would 'produce a hundred contests between the council and the judicature. The Government would be paralysed at the precise moment at which all its energy was required. ... The Europeans would be uncontrolled; the natives would be unprotected'.<sup>106</sup> In order to remove the judge-made law, the codification of indigenous laws was necessary.<sup>107</sup> In this way, the charter bill fully endorsed Bombay's idea that the British authority in India should be united under the government by curtailing the power of the King's Court.

The minister's call for the strong legislative authority naturally provoked criticism. Charles Williams Wynn, the former President of the Board of Control, argued that it was the measure to give the governor general 'a vast and unnecessary power'.<sup>108</sup> Radical James Silk Buckingham pointed out that, the King's Court being deprived of the power of legislative veto, hereafter the government could pass any regulations even if they were 'repugnant to the spirit of the British Constitutions':

Now ... by the unlimited power given to the Legislative Council of India, composed only of five persons, and these neither elective nor responsible in any degree to the British or Indian community, any regulation might be passed, without the sanction of the King's Courts; the Trial by Jury, the Liberty of the Press, the Habeas Corpus, and every other constitutional safeguard of liberty, might be suspended or abolished without appeal or without redress.<sup>109</sup>

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<sup>105</sup> Ibid., 528

<sup>106</sup> Ibid., 530.

<sup>107</sup> Ibid., 533.

<sup>108</sup> Ibid., cols 662–4 (15 July 1833).

<sup>109</sup> Parl. Debs. (series 3) vol. 20, cols 26–7 (26 July 1833).

Tories, and even Lord Ellenborough, the arch-enemy of the King's Court, joined the opposition from a party-political perspective.<sup>110</sup> However, the interest on the issue was not high in Britain, after all.<sup>111</sup> The bill passed the Commons in an almost empty house.<sup>112</sup>

## VI. Conclusion

The Charter Act of 1834 established the supremacy of the legislative over the judiciary. It deprived the King's Court of its legislative function in registering regulations. Though a Law Member was appointed to the legislative council, he was rather a subordinate legal advisor, not a substitute of the King's Court with the power of legislative veto.<sup>113</sup> The governor general was empowered to make emergency legislation without the agreement of the King's Court. The logic of emergency institutionalised the exceptions of the rule of law.

At the same time, this process was accompanied by an ironic consequence: Bombay's concerns about the security in the mofussil and the demise of the Indian aristocracy were given only a secondary importance in the debate in London. For Macaulay, as for the judges of the King's Court, the territories and peoples of India were already settled, and the tribal raids posed no problem for the British rule:

I see that we have established order where we found confusion. I see that

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<sup>110</sup> Ibid., cols 314–5 (5 Aug. 1833).

<sup>111</sup> Cf. Bowen, *Business of empire*, 296.

<sup>112</sup> *The Greville diary, including passages hitherto withheld from publication*, ed. Philip Whitwell Wilson, 2 vols. (London, 1927), ii. 413, 3 Sep. 1833; *The Holland House diaries 1831–1840: The diary of Henry Richard Vassall Fox, third Lord Holland, with extracts from the diary of Dr. John Allen*, ed. Abraham D. Kriegel (London, 1977), 463n34.

<sup>113</sup> Jain, *Outlines*, 426–7.



the petty dynasties which were generated by the corruption of the great Mahometan empire, and which, a century ago, kept all India in constant agitation, have been quelled by one overwhelming power. I see that the predatory tribes who, in the middle of the last century, passed annually over the harvests of India with the destructive rapidity of a hurricane, have quailed before the valour of a braver and sterner race—have been vanquished, scattered, hunted to their strong holds, and either exterminated by the English sword, or compelled to exchange the pursuits of rapine for those of industry.<sup>114</sup>

Mill likewise believed that British direct rule was the only way to prevent the raids.<sup>115</sup> Consequently, the charter renewal was a turning point of British attitudes towards the Indian aristocracy. Lord Ellenborough and Charles Grant, the successive presidents of the Board of Control, had no hesitation in annexing the princely states in cases of maladministration.<sup>116</sup> In 1836 Macaulay objected the Madras government's proposal to expand its exemption of sardars from the ordinary court.<sup>117</sup> To use C. A. Bayly's phrase, the early prudence was being replaced by 'the hard edge of early Victorian dogmatism' and the former princes were being deposed as 'sham kings' and 'drones on the soil'.<sup>118</sup>

Nonetheless, we should not overemphasise the discontinuity in the government's policy towards sardars. There were always those officers who preferred interventionist or non-interventionist policy and the swing from the one to the other was common throughout the British rule in India.<sup>119</sup> Rather,

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<sup>114</sup> Parl. Debs. (series 3) vol. 19, cols 521–2 (10 July 1833).

<sup>115</sup> PP 1831–32 (735–VI), 6–7, J. Mill, evidence, 16 Feb. 1832, quoted in Thomas R. Metcalf, *The aftermath of revolt: India 1857–1870* (Princeton, NJ, 1965), 31.

<sup>116</sup> Philips, *EIC*, 271–4, 279; George D. Bearce, *British attitudes towards India 1784–1858* (Oxford, 1961), 191; see also Conclusion below.

<sup>117</sup> *Macaulay's Legislative Minute*, ed. Dharker, 237–8, T. B. Macaulay, minute, 7 Mar. 1836.

<sup>118</sup> Bayly, *Indian society*, 135.

<sup>119</sup> Thomas Metcalf's explanation of the late nineteenth century is constructed

what should be attended to is the mechanism by which the despotism of the government was strengthened. The establishment of the legislative council shows that the existence of political crises in the mofussil became the driving force of the reform of Indian government. The sense of crisis held by the officials in the turbulent external and internal frontiers was transmitted to the provincial governments and hardened their attitudes, and at a particular timing such as the charter renewal, it reformed the structure of the government in India. This pattern—the sense of crisis at the fringe of empire strengthened the government’s logic of emergency and weakened the rule of law—was constantly observable throughout the rest of the nineteenth century, as we shall see in our Conclusion.

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around these shifts between intervention and non-intervention. Metcalf, *Aftermath*.

## Conclusion

This study has pointed out that the government's logic of emergency in Bombay in the 1820s was hardened and regularised by two things. One was the government's security fear in the mofussil emanating from the incessant political crisis. The other was the King's Court's counter logic of law which restrained the government's discretion in times of emergency. At the heart of these two factors was the agency of the Indian people who appropriated the conflicting British legal authorities. In order to deal with the problem, the government set the realm of politics and emergency outside the realm of law and regularity and tried to enhance administrative efficiency and security at the same time. Expanding our examination spatially and chronologically, I would like to conclude this study by observing the recurrence of the themes and motives which we detected in the previous chapters. I look at the later development of colonial governance in India after the charter renewal of 1834 and suggest that it was characterised by a further strengthening of the government's logic of state necessity. Its background was the successive wars of conquest and the government's engagement in the post-war settlement and consolidation in the aftermath of these conquests, and its driving force was the judiciary's check on the executive and the Indians' use of the divide. Like the Deccan in the 1820s, the government tried to put the inner and outer frontiers under its exclusive control, but the judges of the King's Court continued their challenge and the Indians their jurisdictional jockeying. I also suggest that this continuing conflict generated synthetic new conceptions of sovereignty and the rule of law.

After Macaulay left India in 1838, India entered a new era of conquest. The

government's attention was fixed to the emergencies at the fringes of empire, and the conditions in the 1820s Deccan were repeated throughout the Indian subcontinent in the 1830s and 40s. Each conquest strengthened the government's logic of emergency. The last days of Bentinck's administration showed some signs of it.<sup>1</sup> But the new, aggressive imperialism was fully advocated by Lord Ellenborough, who presided over the Board of Control three times in the 1830s and 40s. It was motivated by the political concern of stabilising the frontiers of the Indian empire. The first manifestation was the Afghan War between 1838 and 1842, which was commenced for fear of the Russians. The result was the 'massacre' of more than 16,000 British soldiers and civilians in a battle in January 1842. The next target was Sind (1838–43), the den of predatory tribes who often intruded the north-western frontiers of British India. Ellenborough appointed Charles Napier as the Chief Commissioner of Sind for its annexation. Napier expunged the chiefs (amirs) and put a semi-military settlement. He was convinced, like Elphinstone and Malcolm, that the civil and military powers should be combined in one hand in the disturbed region.<sup>2</sup>

The government's logic of emergency was intensified by Governor General Lord Dalhousie (1848–56). He annexed the Punjab in the Second Sikh War in 1849 and Pegu (Lower Burma) in the Second Burma War in 1852. These were supplemented by the annexations of princely states by his doctrine of lapse, dictating that 'on all occasions where heirs natural shall fail, the

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<sup>1</sup> Bentinck wanted the direct rule in Jaipur and Gwalior and annexed the hilly state of Coorg in 1834. Rosselli, *Bentinck*, 230–1.

<sup>2</sup> Ainslie T. Embree, 'Napier, Sir Charles James (1782–1853)', *ODNB*; online edn, Jan. 2008 [<http://www.oxforddnb.com/view/article/19748>, accessed 23 Jan. 2016]; Matthew A. Cook, *Annexation and the unhappy valley: the historical anthropology of Sindh's colonization* (Leiden, 2015).

territory shall be made to lapse and adoption should not be permitted'.<sup>3</sup> The lapse of Satara in 1849 ushered further resumptions of Nagpur (1854)<sup>4</sup> and Awadh (1856). Among these newly acquired territories, the Punjab in particular became the arena of paternal rule under the Chief Commissioner John Lawrence (1853–8). He advocated a strong bureaucratic hierarchy of district officials combining executive and judicial powers guarded by more than 20,000 policemen and 24,000 frontier forces.<sup>5</sup> This became the model of 'Non-Regulation system', in which the personal rule combining all powers in the hands of commissioners and district officers was, when the initial period of settlement was over, to be replaced by the local government of lieutenant governors, as the Punjab was made in 1859.<sup>6</sup> Burma highlighted Dalhousie's logic of emergency through his conflict with the anti-imperialism of home authorities and radicals such as Richard Cobden.<sup>7</sup> His aggressive policy well resonated with the mid-nineteenth-century gun-board diplomacy of Lord Palmerston, who thought that the oriental despotism should be abolished and recalcitrant chiefs should be reformed.<sup>8</sup>

Meanwhile, pressed by the financial burden of the wars of conquest,<sup>9</sup>

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<sup>3</sup> S. N. Prasad, *Paramountcy under Dalhousie: Being a thesis on the policy of Dalhousie towards the protected Indian states* (Delhi, 1964), 106.

<sup>4</sup> Dalhousie was also opposed by a member of his Council, John Low, former resident of Hyderabad, based on the perspective of the empire of opinion: 'there shall be among its native subjects a much more general attachment to the ruling powers than there is at present among the inhabitant of British India'. Quoted in Ramusack, *Indian princes*, 83.

<sup>5</sup> David Steele, 'Lawrence, John Laird Mair, first Baron Lawrence (1811–1879)', *ODNB*; online edn, Jan. 2011 [<http://www.oxforddnb.com/view/article/16182>, accessed 23 Jan. 2016].

<sup>6</sup> William Wilson Hunter, *The Marquess of Dalhousie* (4th edition, Oxford, 1890), 187–9.

<sup>7</sup> George D. Bearce, *British attitudes towards India 1784-1858* (Oxford, 1961), 203–12.

<sup>8</sup> David Cannadine, *Ornamentalism: How the British saw their empire* (London, 2001), 22.

<sup>9</sup> Charlesworth, *Peasants and imperial rule*, 53.

the Bombay government wanted to advance its mofussil governance from the stage of conquest to that of consolidation and regularity, which had not been realised in the 1820s. George Arthur (1842–6), the governor who supported the Afghan War and the conquest of Sind, targeted the vast alienated lands in the presidency. In 1843, he established the Inam Commission, a special tribunal examining whether the landholders held proper documentation to prove their rightful possession.<sup>10</sup> The commission was first appointed to investigate the tenures in the Southern Maratha Country and enlarged to the whole presidency in 1852. It eventually ‘recovered’ Rs 50 lakh, or 40 percent, out of 122 lakh of inam lands.<sup>11</sup> It was known as ‘that great confiscatory Tribunal’, which was headed by military men ‘who were not well versed in the principles of law’.<sup>12</sup>

Some Bombay officials such as George Clerk,<sup>13</sup> Bartle Frere<sup>14</sup> and James Outram<sup>15</sup> apprehended the excess of aggression against the local chiefs and sardars.<sup>16</sup> They were opposed to the lapse of Satara in 1849.<sup>17</sup> But even these paternalists were more relaxed than the officials in the 1820s; they could assert that the sardars should be positively remodelled as the agent of reform,

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<sup>10</sup> For the origin of the Inam Commission, see Preston, *The dev of Cincvad*, 164–81.

<sup>11</sup> Alfred Thomas Etheridge, *Narrative of the Bombay inam commission and supplementary settlements*, SRBG 132, new series (Poona, 1873).

<sup>12</sup> John Kaye and Colonel Malleon, *Kaye’s and Malleon’s history of the Indian mutiny of 1857–8*, 6 vols. (London, 1909–14), i. 127; A. G. L. Shaw, ‘Arthur, Sir George, first baronet (1784–1854)’, *ODNB*; online edn, May 2013 [<http://www.oxforddnb.com/view/article/707>, accessed 23 Jan. 2016].

<sup>13</sup> The governor of Bombay, 1848–50.

<sup>14</sup> Resident at Satara, 1847–48; the commissioner for Sind, 1849–59; the governor of Bombay, 1862–7.

<sup>15</sup> The commissioner for Lower Sind, later combined with Upper Sind, 1839–43; Resident of Satara, 1845–7; Resident of Baroda, 1847–8.

<sup>16</sup> Bearce, 191–9. Embree, ‘Napier’, *ODNB*; R. H. Vetch, ‘Outram, Sir James, first baronet (1803–1863)’, rev. Ainslie T. Embree, *ODNB*; online edn, Jan. 2011 [<http://www.oxforddnb.com/view/article/20962>, accessed 23 Jan. 2016].

<sup>17</sup> *Satara gazetteer*, 312–4; Ramusack, *Indian princes*, 80–7; Kulkarni, *Satara raj*, 31–5.

rather than left for their own ways. Advocating ‘the mixture of races’,<sup>18</sup> Frere articulated that the sardars should not be cut off from the rest of the world. They should learn English and, significantly, travel to Bombay to learn new things.<sup>19</sup> Contrary to Malcolm, then, Frere’s empire of opinion did not contradict with the attempt of the chief’s Anglicisation.<sup>20</sup>

The spirit of intervention covered the other parts of the subcontinent. In the North Western Provinces, for example, the demise of the smaller talukdars was significantly accelerated by government policy in the late 1830s and the early 1840s.<sup>21</sup> At an all India level, the Act I of 1849 allowed the government to establish ‘political courts’ with criminal jurisdiction in the territories of foreign princes as well as the jagirdars and sardars in British India.<sup>22</sup> As John Stuart Mill pointed out, the princes and the chiefs lost their independence and became mere government servants.<sup>23</sup>

But the governments’ conquests were criticised by the judges and their works of consolidation were hindered by the Indians’ appropriation of the King’s Court. There were ample examples to show that the judiciary (the Supreme Courts till 1862 and the High Courts since then) functioned as a check to the government after 1834, though its ideological outlook and mode of interaction with the executive was modified by the changing political circumstances. The creation of the legislative council in Calcutta in 1834 did not solve the problem of the King’s Court’s jurisdiction. Ultimately, a mere

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<sup>18</sup> Bayly, *Recovering liberties*, 174–5.

<sup>19</sup> John Martineau, *The life and correspondence of Sir Bartle Frere*, 2 vols. (London, 1895), i. 476–9, Bartle Frere, address, 4 Sep. 1865.

<sup>20</sup> Dharm Pal, *Administration of Sir John Lawrence in India (1864–1869)* (Simla, 1952), 113–8.

<sup>21</sup> Stokes, *Peasant and the raj*, 67–9; Stokes, *Utilitarians*, 116.

<sup>22</sup> BL, IOR V/27/100/2, *Minutes by the Hon Sir Barnes Peacock 1852–1859* (Simla, 1901), 30–34, Barnes Peacock, minute, 6 Oct. 1853.

<sup>23</sup> *The collected works of John Stuart Mill, volume XXX: Writings on India*, ed. John M. Robson, Martin Moir, and Zawahir Moir (Toronto, 1990), 151–3.

structural change could not suppress the power of the colonised to appropriate colonial institutions. All the problems observed in 1820s Bombay were repeated in the Indian age of reform.<sup>24</sup> This tendency was manifest in Bombay in the 1840s, when its chief justice Thomas Erskine Perry, once a radical MP in Britain,<sup>25</sup> repeated what the judges did in the 1820s.

First, Perry insisted that the government officers should assist the execution of the writ of the King's Court in the mofussil. In *Aga Mahomed Jaffer v. Mahomed Saduck* in 1847, Perry held that it was in contempt of the court to arrest its officers executing its process and that the government officials who arrested them were liable to be committed.<sup>26</sup> Two years later, in a case of swindling, he declared that the committing magistrate should attend the court during the trial of all cases committed by him. When the magistrate said that the Company's regulations forbade him from doing so, Perry replied that he did not care about the regulations because he was administering English law, and that he would fine the magistrate with Rs 1,000 when he was absent next time.<sup>27</sup>

Perry also claimed that the King's Court had jurisdiction over the government's revenue administration. In *Ramchund Ursamul v. H. H. Glass* in

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<sup>24</sup> Madras Supreme Court's writ in the princely states disputed in 1839–40. BL, IOR F/4/1894/80273.

<sup>25</sup> Erskine Perry was the founder of the Parliamentary Candidate Society 'to point out proper persons as candidates at the next election' in 1831. The member included Francis Place, Francis Burdett, Jeremy Bentham, Joseph Hume and Daniel O'Connell. See Francis Place, 'Papers relating to the Parliamentary Candidates Society', in *London Radicalism 1830–1843: A selection of the papers of Francis Place*, ed. D J Rowe (London, 1970), 15–25. <http://www.british-history.ac.uk/london-record-soc/vol5/pp15-25> [accessed 21 November 2015].

<sup>26</sup> Thomas Erskine Perry, *Cases illustrative of oriental life, and the application of English law to India, decided in H. M. Supreme Court at Bombay* [hereafter *Perry O.C.*] (London, 1853), 398–401.

<sup>27</sup> Ram Gopal Sanyal, *Reminiscences and anecdotes of great men of India, both official and nonofficial, for the last one hundred years*, 2 vol. (1894–95), i. 105–6 (*Friend of India*, 18 Oct. 1849).



1844, he held that the Supreme Court had jurisdiction over the custom house officers who collected revenue under the Bombay regulations.<sup>28</sup> In *Hurkissondass v. Spooner* in 1847, Perry held that the collector of the government in the island of Bombay was amenable to the Supreme Court, though this was later reversed by the Privy Council.<sup>29</sup>

At the same time, Perry interpreted the power of the legislative council as little as possible. In a case commonly called the Dharwar process in 1849, he did so in regard to Act XXIII of 1840, which allowed the writ of the Company's courts to be executed within the presidency towns when indorsed by the King's Court. In the judgement, Perry held that the legislative council did not have the power to expand the zilla court's jurisdiction to try the Bombay inhabitants. He refused to indorse the judgement of the zilla court, vindicating the autonomy of the King's judges to do so.<sup>30</sup> This shows that the conflict between legislation and precedent as sources of law also continued after the 1820s.

These cases had the same pattern as those in the 1820s. First, the Indians' use of the King's Court led to the King's Court's claim of its extended jurisdiction over formerly limited areas. Perry admitted that 'undoubtedly, this Court, like every other tribunal, has an undue bias towards extending its jurisdiction, and is prone to grasp at any increase of powers (so dear to human frailty), more especially when urged upon it in the flattering and eloquent appeals of suitors at the bar'.<sup>31</sup> Second, the judges ruled in favour of the plaintiff in India, but they were overturned by the Privy Council in Britain. This was also true in cases of private law. In a Parsi matrimonial

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<sup>28</sup> Perry *O.C.*, 360–72.

<sup>29</sup> Perry *O.C.*, 373–97; BL IOR V/27/141/10.

<sup>30</sup> Perry *O.C.*, 406–14.

<sup>31</sup> Perry *O.C.*, 343–59, *Dhackjee Dadajee v. EIC*, 1843.

case in 1843 (*Perozeboye v. Ardaseer Cursetjee*), the chief justice started to claim that the ecclesiastical jurisdiction of the Supreme Court covered the non-Christian inhabitants in Bombay city.<sup>32</sup> The defendant appealed to the Privy Council and the decision was reversed.<sup>33</sup>

Despite these oppositions to the government in the court room, however, the ideological outlook of the King's Court was transmuted in a significantly way after 1834. In *Regina v. Shaik Boodin* in 1846, the power of the King's Court to issue a writ of habeas corpus against a native court martial in the mofussil was disputed. In his long judgement, Perry ruled that the King's Court did not have such power, expressly endorsing the decision of the Privy Council in the case of J. P. Grant's petition in 1828. He articulated that English legal decisions could not be applied to the mofussil, where 'race, history, religion, and constitution' were totally different and, particularly, where the administration should follow the way of oriental despotism, in which the distinction between the civil court and the court martial did not exist.<sup>34</sup> So the possibility of applying the same English law in the presidency town and in the mofussil and the distinction between the civilian and the military interpretations of Indian society, which were so vital in the court's opposition in the 1820, were abandoned by what Malcolm had emphasised in the 1820s: the idea of insuperable difference between the inhabitants in Bombay city and in the mofussil.

After Perry's departure from Bombay in 1852, there was another case of habeas corpus in 1857, in which the court also succumbed to the government.

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<sup>32</sup> Perry, *O.C.*, 57–72. This case caused some moral panic in the Parsi reformers in Bombay who opposed the polygamy. Sharafi, *Law and identity*, 171–2. The court reassured it next year in *Buchaboye v. Merwangee Nasserwangee*. Perry *O.C.*, 73–5.

<sup>33</sup> Jain, *Outlines*, 107–8.

<sup>34</sup> Hussain, *Jurisprudence*, 86–7; Perry *O.C.*, 434–66.

One Luxmon Dhejah was arrested for treason and confined to a jail in Bombay city. He was then transferred to a jail in Thana under the government's order. The chief justice Willian Yardly (1852–8) claimed that it was illegal to arrest the criminal within the jurisdiction of the King's Court and issued a writ of habeas corpus against the jailor of Thana. But the European bailiff who went there to arrest the jailor was confined by the government's superintendent of the police. The King's Court could do nothing but admit its inability to resist the military force of the government.<sup>35</sup> Thereafter, the power of the High Courts to issue habeas corpus was gradually curtailed in statutes: Act X of 1872 limited its writ jurisdiction in the presidency towns, and in Act X of 1875 it was replaced by a new set of rules altogether. Finally, in 1898, the Code of Criminal Procedure (Act V) stipulated that the High Courts did not have the power to issue habeas corpus in cases of state prisoners and state offences.<sup>36</sup>

Perry continued his challenge to the government after he returned to Britain. He was elected a radical MP for Devonshire in 1853–9 and criticised Dalhousie's annexation of Awadh. He was then appointed to the Council of India (1859–82), the advisory board for the secretary of state for India. During that period, he continued his challenge against the government, in such cases as an inheritance issue of the Nawab of Surat in 1856.<sup>37</sup>

The age of reform was abruptly ended by the Revolt of 1857. Dalhousie's principle of conquest and annexation was criticised by the post-Mutiny administrators as the cause of the catastrophe. The Indian government after

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<sup>35</sup> Sanyal, *Reminiscences*, i. 102 (*Friend of India*, 23 Feb. 1858).

<sup>36</sup> Hussain, *Jurisprudence*, 96.

<sup>37</sup> Parl. Debs. (series 3) vol. 142, cols 1297–316 (11 June 1856).

1858 was characterised by ‘the restoration of the aristocracy’, which was led by India Secretary Charles Wood (1859–66). The old policy of conciliation returned with a renewed vigour. The minor chiefs (talukdars) who did not join the insurgents were rewarded by the newly created Star of India Order.<sup>38</sup> Even those who joined the rebellion in Awadh, the centre of the revolt, were promised to have their lands restored, given new sanads in open Durbar, and vested with the revenue and police jurisdiction in their estates, as they were thought to be ‘a useful instrument in restoring order and tranquillity’.<sup>39</sup> This policy of conciliating landed aristocracy by vesting civil, revenue and police jurisdictions was also promoted in the North Western Provinces, Sind, the Punjab and the newly-formed Central Provinces including the Sagar and Narbada territories.<sup>40</sup> Even in Bengal, the government strengthened the village police supervised by the panchayat in place of the British regular police, provoking local officers’ resentment.<sup>41</sup>

The reaction was also manifest in Bombay. The work of the inam commission became the focus of revision. The Mutiny caused fear among the government officials about the too obvious similarity between the talukdars of Awadh and the inamdars of the Deccan. Governor John Elphinstone (1853–9) was inclined to halt the commission’s work as a ‘measure of healing and pacification’.<sup>42</sup> He also proposed to exempt the inam lands from the sale for debts by the civil courts, which was opposed but partially admitted by the

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<sup>38</sup> Miles Taylor, ‘Queen Victoria and India 1837–61’, *Victorian Studies*, 46, 2 (2004), 271.

<sup>39</sup> Metcalf, *Aftermath*, 137.

<sup>40</sup> Ibid., 134–73; R. J. Moore, *Sir Charles Wood’s Indian policy 1853–66* (Manchester, 1966), 178–88.

<sup>41</sup> Erin M. Guiliani, ‘Strangers in the village?: Colonial policing in rural Bengal 1861 to 1892’, *MAS*, FirstView article (February, 2015), 1–27.

<sup>42</sup> Speech by Erskine in the legislative council, 8 Jun 1861, quoted in Metcalf, *Aftermath*, 238.

Supreme Government. Elphinstone's policy was supported by James Outram, the military member of the governor general's council, who resented 'the rapid extinction' of the native aristocrats, 'perhaps the most serious source of discontent with our rule'.<sup>43</sup> Then the government under Bartle Frere (1862–7) introduced a scheme of inam commission's 'summary settlement' (Acts II and VII of 1863) in which the collectors could confirm an inam by a summary assessment and only those who refused it were subjected to a full-scale assessment.<sup>44</sup> The government also conciliated in Gujarat. In 1860, the Thakur of Bhavnagar was conceded the city and some villages by the acting governor George Clerk (1860–2). He also enacted the Ahmedabad Talukdars' Relief Act of 1862 to secure the minor chiefs' estates from attachment or sale for debts, which was expanded as a general Encumbered Estates Act in 1877.<sup>45</sup> Meanwhile, the sardars' privilege of legal exemption was confirmed in the Code of Civil Procedure (Act VIII of 1859, c.12, s.384). The line between the political and the legal spheres was renewed and rigidly drawn, and the political system of exemption was strengthened.

But, although it is common to assume discontinuity before and after the Mutiny by referring to such changes,<sup>46</sup> in terms of the relationship between the executive and the judiciary, and that between the logics of law and state necessity, the Mutiny changed little. The government's logic of state necessity was strengthened, like in Bombay in the 1820s, by the judiciary's interference. The restoration of conciliation policies after the revolt also restored the judge's interference in them. The battlefield was the legislative council, which

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<sup>43</sup> Metcalf, *Aftermath*, 213–4.

<sup>44</sup> Charlesworth, *Peasants and imperial rule*, 55; see also B. H. Baden-Powell, *The land systems of British India*, 3 vols. (Oxford, 1892), iii. 304.

<sup>45</sup> Thakurs Encumbered Estate Act. Charlesworth, *Peasants and imperial rule*, 64–5.

<sup>46</sup> e.g. Metcalf, *Aftermath*.

was enlarged by the Charter Act of 1854 and now included the judges of the King's Court as its members. The *bête noir* was the Calcutta chief justice Barnes Peacock, the Law Member of the Council (1852–9) and a member of the legislative council (1859–62).<sup>47</sup> Soon after his entrance, he opposed the government's policy in Bombay city such as the Licence Tax Bill of 1859 or the Arms Act of 1860,<sup>48</sup> but most problematic was his meddling with the issues of princes and sardars in the mofussil.

First, Peacock was opposed to a large grant to the Mysore family made by Charles Wood's home government in 1860. He moved in the legislative council for the papers and correspondence. The matter was pressed to a vote and his motion was carried. This raised, as Rankin explains, the full claim of the legislative council's power of judicial check to 'procure redress of grievances committed by the executive'. This eventually induced the government to deny definitively such a claim in the eventual Act of 1861.<sup>49</sup> Second, when the council discussed the proposal of the lieutenant governor of the North Western Provinces to exempt the alienated lands given for public services from the ordinary action in the courts of law, Peacock expressed his view that the governor general in council under the Charter Acts did not have any power to alienate lands by making such grants. Charles Wood and Bartle Frere were infuriated by this 'monstrous' and 'most unjustifiable' denial of 'the sole foundation of all title of landed property'.<sup>50</sup>

As a consequence of these oppositions, the government excluded the

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<sup>47</sup> Martineau, *Life of Frere*, i. 331, 327, 336–41, 356; Metcalf, *Aftermath*, 182–6, 265; Andrew Sartori, *Liberalism in empire: An alternative history* (Berkeley, 2014), chapter 2: 'the Great Rent Case'.

<sup>48</sup> Sanyal, *Reminiscences*, i. 136–7. Martineau, *Life of Frere*, i. 328–31.

<sup>49</sup> George Claus Rankin, *Background to Indian law* (Cambridge, 1946), 64–5; Moore, *Wood's Indian policy*, 165–77; BL, IOR V/27/100/2, *Peacock minutes*, 47–54.

<sup>50</sup> Martineau, *Life of Frere*, i. 331–2.

King's judges from the legislative council in the Indian Councils Act of 1861, which was 'popularly said to be an Act to abolish Sir Barnes Peacock'.<sup>51</sup> In the same Act, the governor general's emergency legislation was also strengthened by vesting him with 'a new and extraordinary power of making and promulgating ordinances in cases of emergency on his own responsibility'.<sup>52</sup> The insistence of the judicial check against the government by the judges once again led to the strengthening of the despotic character of the Indian government.

The despotism of Indian government was further consolidated in the late 1860s by the governor general John Lawrence (1864–9) and the so-called Punjab school administrators. They tried to model the government of India on their experience in the Punjab and other Non-Regulation provinces. They advocated the exclusion of local Indian bosses and rigid control by the bureaucratic hierarchy from the governor general down to the district officers in the provinces.<sup>53</sup> They advocated codification, though they emphasised the importance of customs rather than sacred texts.<sup>54</sup> The practical expression of this policy was a series of draconian measures such as the Murderous Outrages Act of 1867 or the Frontier Crimes Regulation of 1872, 1887 and 1891, which infused the militarist value to the civil government.<sup>55</sup>

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<sup>51</sup> A. C. Banerjee, *English law in India* (New Delhi, 1984), 143.

<sup>52</sup> H. H. Dodwell (ed.), *The Cambridge history of India, volume VI: The Indian empire 1858–1918* (Delhi, 1958), 236; Courtenay Ilbert, *The government of India: Being a digest of the statute law relating thereto with historical introduction and illustrative documents* (Oxford, 1898), 215–6; *Ibid.*, 566, para 26, Wood's despatch, 9 Aug. 1861.

<sup>53</sup> Lawrence and Frere fought a severe battle over the Supreme Government's financial control over subordinate presidencies. Metcalf, *Aftermath*, 256–8.

<sup>54</sup> Neeladri Bhattacharya, 'Remaking custom: The discourse and practice of colonial codification', in R. Champakalakshmi and S. Gopal (ed.), *Tradition, dissent and ideology: Essays in honour of Romila Thapar* (New Delhi, 1996), 20–51.

<sup>55</sup> Mark Condos, 'Licence to kill: The Murderous Outrages Act and the rule of

But, again, the government's logic of state necessity was regularly frustrated by the judiciary's political intervention, which was illustrated by the process of enactment of the Punjab Criminal Tribes Act (XXVII) of 1871. In 1867 the Punjab Chief Court reviewed two cases in which the government fined and imprisoned tribal raiders for leaving their villages without holding tickets of leave. The court ruled that the government's order to hold the tickets was illegal. In order to take away the effect of this ruling and 'to wage continual warfare' against the tribes, the governments of the Punjab and the North Western Provinces attempted to enact the Criminal Tribes Act.<sup>56</sup> However, they were strongly contested by the judges of the Punjab Chief Court and the High Court of the North-Western Provinces, who feared that it would jeopardise the personal liberty of the tribal people. William Muir, the lieutenant governor of the North Western Provinces, lamented that the judges' perspective was confined to 'dealing with crime after it has been committed'.<sup>57</sup>

The Bombay government was also persistently annoyed by the judiciary. In 1870, the Bombay High Court decided that the Acts of local legislatures were not binding on Europeans, who could only be punished by indictment in the High Court. On this point the Madras High Court differed. So the government was caught in a difficult situation: if the High Court at Calcutta followed the Bombay decision, there would be conflict between the

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law in colonial India 1867–1925', *MAS*, FirstView Article (June 2015), 1–39; Benjamin D. Hopkins, 'The Frontier Crimes Regulation and frontier governmentality', *Journal of Asian Studies*, 74, 2 (2015), 369–89.

<sup>56</sup> Quoted in Sanjay Nigam, 'Disciplining and policing the "criminals by birth", part 1: The making of a colonial stereotype—The criminal tribes and castes of North India', *IESHR*, 27, 2 (1990), 145.

<sup>57</sup> Andrew J. Major, 'State and criminal tribes in colonial Punjab: Surveillance, control and reclamation of the 'dangerous classes'', *MAS*, 33, 3 (1999), 665–8, 686; Nigam, 'Disciplining and policing, pt1', 134–50.



government and the High Courts, while if otherwise, there would be a conflict among the High Courts; both scenarios were detrimental to the unity of British authority.<sup>58</sup> The court also continued meddling with the political arrangement with the chiefs. In 1871, for example, the Bombay High Court claimed its jurisdiction over the territories which were ceded by the Company to the princely state of Edur (Idar) in Gujarat, ‘a mountainous and jungly country, inhabited principally by Bheels’.<sup>59</sup>

In dealing with these jurisdictional conflicts, the government officials developed a new conception of the rule of law, which did not contradict with and was even conducive to the government’s logic of state necessity. At the forefront of this attempt were the two successive Law Members of the Governor Generals’ Council, Henry Maine (1862–9) and James Fitzjames Stephen (1869–72). Although they did not have any first-hand experience of local governance, their theory of law was based on their experience of dealing with the practical problems in the mofussil. So they were critical of abrupt reforms of Indian customs advocated by the Law Commission now sitting in London. Maine argued that the Commission was wrong in thinking that India was ‘a field for the application of a diluted Benthamism’. Stephen warned Prime Minister Lord Argyll that the Commission was jeopardising the legislative autonomy of the Indian government. He had a ‘very little belief in the opinion that you can properly frame the systems of ... substantive law upon abstract principles as if they were mathematical theories at a distance

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<sup>58</sup> BL, IOR V/27/100/6, *Minutes by the Hon Sir James Fitzjames Stephen 1869–1872* (Simla, 1898), 118–9, James Fitzjames Stephen, minute, 6 July 1870.

<sup>59</sup> Ibid., 140–2, J. F. Stephen, minute, 26 June 1871. For Idar, see Aitchison, *Treaties, engagements and sanads*, vii. 75–8. Quotation was from Clunes, *Indian princes*, 203.

from the places and people affected by them'.<sup>60</sup>

Maine, as the Law Member John Lawrence's Council, invented a more interventionist conception of sovereignty which justified the interference of the British government in the internal affairs of foreign princes. This was best captured in his famous minute on Kathiawar in 1864. He wrote it when the Supreme Government received a report from the Political Agent of Kathiawar on the lawless state of the region. The Agent proposed that, in order to keep law and order, Kathiawar should be divided into smaller districts presided over by European magistrates and that the Political Agent should be empowered as the sessions judge of the entire region.<sup>61</sup> Maine, with the governor general John Lawrence, endorsed this plan of internal interference. He argued that the Kathiawar states were the 'foreign territory' sharing sovereignty with the British government and enjoying several sovereign rights such as the 'immunity from foreign law', but this was not inconsistent with the right of the British government to interfere 'for the good order of society and the well-being of the people'.<sup>62</sup> In another minute of the same year, he developed his idea on sovereignty and British intervention. When the Supreme Government received Richard Temple's report on the chiefs of the Central Provinces, Maine recommended that the chiefs should be classified either as British subjects or as sovereigns. He explained that, if the chiefs were British subjects, the government did not have any power to regulate their position and could not give them any power or privilege unknown to the law. On the other

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<sup>60</sup> K. J. M. Smith, *James Fitzjames Stephen: Portrait of a Victorian rationalist* (Cambridge, 1988), 127–8, H. Maine to M. E. Grant Duff, 22 Dec. 1868; *ibid.*, 128, J. F. Stephen to the Duke of Argyll, 25 July 1870.

<sup>61</sup> Pal, *Lawrence*, 40–1.

<sup>62</sup> BL, IOR V/27/100/3, *Minutes by the Hon Sir H. S. Maine 1862-69 with a note on Indian codification dated 17 July 1879* (Calcutta, 1889), 35–8, Proceedings, Foreign Department, Political, A, April, 1864, No. 17, Henry Maine, minute, 22 Mar. 1864.

hand, if they were sovereigns, the government could interfere in their internal affairs for the better order of the state or the well-being of the people.<sup>63</sup> In other words, contrary to Elphinstone and Malcolm in the 1820s, Maine argued that the sovereign status of the petty kings could become a legal foundation of the government's interference.

Stephen, the next Law Member under Lord Mayo, further elaborated this line of discussion by reconceptualising the legitimacy of government's political intervention from the perspective of the rule of law. His famous minute of 1872 was an attempt to give a legal foundation to the discretionary government in the Punjab. The primary aim was to retain the efficiency and authority of the government's district officers who represented the government in the eyes of the Indians. He first advocated the separation of the district officials' executive and judicial powers. This was because their executive 'vigour' was weakened as they were preoccupied with the technicality and rigidity of judicial works, which eventually resulted in 'converting them into lawyers'.<sup>64</sup> But, while judges with civil jurisdiction should be appointed, the district officers should retain the criminal jurisdiction, 'the most distinctive and most easily and generally recognised mark of sovereign power':

All the world over that man who can punish is the ruler. Put this prerogative exclusively in the hands of a purely judicial office who has no other relations at all to the people, and who passes his whole life in a Court, and I can well believe that the result would be the break down in their minds the very notion of any sort of personal rule or authority on

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<sup>63</sup> Ibid., 40–3, Proceedings, Foreign, Political, June 1864, nos. 14–6, H. Maine, minute, 11 May 1864.

<sup>64</sup> *Minute by the Hon'ble J. Fitzjames Stephen on the administration of justice in British India, Selections from the records of the government of India, home department*, 89 (Calcutta, 1872), 11.

the part of the Magistrates.<sup>65</sup>

In Stephen's judicial system, the independent judiciary of the King's Court had nothing to do with achieving the rule of law. He admitted that initially the King's Court had been necessary as a check against the officials, the 'irresponsible despots', but now the time had gone by, since the Company was substituted by the Crown government. Accordingly, the High Courts should be downgraded to a provincial court at the presidency towns as 'exceptional institutions for an exceptional population'; it was necessary 'to give up the notion of checking one part of the Government by another...'.<sup>66</sup> Rather, the government could achieve the rule of law by itself if the law properly defined the amount of discretionary power vested in the hands of government officials: 'The notion that there is an opposition in the nature of things between law and executive vigor, rests on a fundamental confusion of ideas and on traditions which are superannuated and ought to be forgotten'.<sup>67</sup> This means that Stephen justified the government's political intervention in times of peace as well as in times of war, and in the Regulation as well as the Non-Regulations provinces. Soon after, he materialised this idea in the Code of Criminal Procedure in 1872.<sup>68</sup>

Maine and Stephen reconceptualised the relationship between the government and the law in the mofussil. They denied the King's Court's claim that the English rule of law should be introduced (via the presidency towns) in the mofussil; rather, an Indian version of the rule of law should be created by referring to the crisis and state necessity in the mofussil. This was the

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<sup>65</sup> Ibid., 33.

<sup>66</sup> Ibid., 69, 72.

<sup>67</sup> Ibid., 94, 105.

<sup>68</sup> Banerjee, *English law*, 259–60.

legalisation of the government's political interference at the fringes of empire, where the government admitted the sovereignty of the chiefs and sardars in order to enable the government to interfere in their rule 'for the good order of society and the well-being of the people'. In the same way as in the 1820s, the sense of crisis in the mofussil, heightened by the intervention of the judiciary, forged a new type of despotism. Eric Stokes explains that, after the Mutiny, the utilitarians and the paternalists started to depart from each other, and conflict ensued between legalists such as Maine and Stephen and administrators such as John and Henry Lawrence of the Punjab school. But, from our perspective, their amalgamation was further strengthened by Maine's and Stephen's attempt to legalise the government's political interference in times of peace as well as in times of war.<sup>69</sup> Their intervention enabled the British government in India to reserve the tribal frontiers as a sphere of 'tradition' but simultaneously make them as an object of active intervention from the perspective of imperial policy.<sup>70</sup>

The idea of despotic rule of law climaxed with the tory governor generals in the late nineteenth century under the aegis of Prime Minister Benjamin Disraeli. First, the government's crisis-ridden perspective was strengthened under Lord Lytton's administration (1876–80). He resumed the war of conquest for the first time since the Mutiny in the Second Afghan War (1878–80). A strategic concern about the Russian expansion was important, but, as his foreign secretary Alfred Lyall stated, equally important was the

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<sup>69</sup> Stephen even tried to apply this new mode of the rule of law in Britain in his *Liberty, equality, fraternity* (1873) in order to 'remake England in the image of the Raj' on the brink of Gladstone's introducing mass democracy. Thomas R. Metcalf, *Ideologies of the raj* (Cambridge, 1995), 56–9.

<sup>70</sup> Cf. Hopkins, 'Frontier Crimes Regulation'.

government's representation of authority among Indian subjects.<sup>71</sup> Lyall's belief was derived from his experience in dealing with the tribes in the Central Provinces and Rajputana.<sup>72</sup> The devastating famine of 1876–8 only exacerbated the government's concern about its authority.<sup>73</sup> The anxiety of authority found its outlet in the proclamation durbar in 1877.<sup>74</sup> The government also enacted a series of draconian measures such as the Vernacular Press Act and the Indian Arms Act in 1878.<sup>75</sup>

Lord Curzon (1899–1905) inherited this tory vision. He persuaded the Bengali zamindars 'to abstain from drinking too deeply of the wells of justice'.<sup>76</sup> They were expected to cooperate with the local judicial business as honourary magistrates with summary jurisdiction,<sup>77</sup> and the government was 'to pay him and humour him when he behaves, but to lay him out flat when he does not'.<sup>78</sup> He actively intervened in the internal affairs of the princely states in order to bring about efficiency.<sup>79</sup> His subordinate, the lieutenant governor of Bengal John Woodburn, expressed a typical logic of emergency: 'the union of executive and judicial functions in the District and Sub-Divisional Officers

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<sup>71</sup> Mortimer Durand, *Life of the Right Hon. Sir Alfred Comyn Lyall* (Edinburgh, 1913), 215–6.

<sup>72</sup> Karuna Mantena, *Alibis of empire: Henry Maine and the ends of liberal imperialism* (Princeton, NJ, 2010), 166–8.

<sup>73</sup> David Washbrook, 'Lytton, Edward Robert Bulwer-, first earl of Lytton (1831–1891)', *ODNB*; online edn, Jan 2008 [<http://www.oxforddnb.com/view/article/17315>, accessed 23 Jan 2016].

<sup>74</sup> Cannadine, *Ornamentalism*, 46; Bernard S. Cohn, 'Representing authority in Victorian India, in Eric Hobsbawm and Terence Ranger (eds.), *The invention of tradition* (Cambridge, 1983), 165–210.

<sup>75</sup> Abhinav Chandrachud, *An independent, colonial judiciary: A history of the Bombay High Court during the British raj 1862–1947* (Oxford, 2015), 71–2.

<sup>76</sup> *Notable speeches of Lord Curzon*, ed. C. S. Raghunatha Rao (Madras, 1905), 40, George Nathaniel Curzon, speech, 3 Feb. 1899.

<sup>77</sup> *Speeches of Curzon*, ed. Raghunatha Rao, 160–1, G. N. Curzon, Speech, 31 Dec. 1899.

<sup>78</sup> David Gilmour, *The ruling caste: Imperial lives in the Victorian raj* (London, 2005), 166, G. N. Curzon to Joseph Chamberlain, 28 June 1902.

<sup>79</sup> Stokes, *Utilitarians*, 310.

is at present essential', as they should be 'a local head of the district, distinctly and indisputably the central figure, to whom all will turn in times of danger and emergency, and round whom all the forces of law and order will rally'.<sup>80</sup>

The new toryism was constantly challenged by the judiciary, however, and here we can discern a new development of the late nineteenth century: the Indian judges started to criticise it. Bombay led the trend. Bombay lawyers (later chief justices) such as Kashinath Trimbak Telang<sup>81</sup> and Badruddin Tyabji<sup>82</sup> criticised the Lytton's tory imperialism and supported the Ilbert Bill of 1883 which empowered the Indian judges to try Europeans in the mofussil.<sup>83</sup> In his speech, Telang singled out James Fitzjames Stephen, who was against the Bill,<sup>84</sup> and criticised that his jurisprudence was 'the gospel of force' characterised by 'obtrusive antagonism to the doctrines of modern liberalism ... which are embodied in the great Proclamation of 1858'.<sup>85</sup> Indeed, while opinions among the European judges were divided, the Indian judges on the High Courts of Calcutta, Madras and Bombay unanimously defended the Bill.<sup>86</sup> In the 1880s, there was 'a social war' in Bombay between the government and the judges of the High Court.<sup>87</sup> As Chandrachud argues,

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<sup>80</sup> Quoted in Banerjee, *English law in India*, 261.

<sup>81</sup> Chief justice, 1889–93.

<sup>82</sup> The first Indian barrister in Bombay (1867). A member of the Bombay legislative council, 1882–6.

<sup>83</sup> Den Otter, 'Law, authority, and colonial rule', 184; Chandrachud, *Independent, colonial judiciary*, 81, 89.

<sup>84</sup> Stephen strongly criticised the Bill from the perspective of the inherent superiority of the British, the conquering race. He gave a voice to the nonofficial British in India who feared their decline of influence in the face of rising Indian elites. Metcalf, *Ideologies*, 209–11.

<sup>85</sup> Kashinath Trimbak Telang, *Selected writings and speeches, volume 1* (Bombay, 1916), 194.

<sup>86</sup> Edwin Hirschmann, 'White Mutiny': *The Ilbert Bill crisis in Indian and genesis of the Indian National Congress* (New Delhi, 1980), 172–3.

<sup>87</sup> Sanyal, *Reminiscences*, i. 102–3. For a similar tention in Calcutta in the

while there were certainly notable conservative judges such as Mahadeo Govind Ranade (1893–1901), Narayan Ganesh Chandavarkar (1901–13), and D. D. Davar (1906–16), the court decided the majority of routine cases independently from the executive.<sup>88</sup> The relationship between the government and the law was to enter yet another phase of interactions in the twentieth century. As this brief survey suggests, the judiciary's opposition to the executive and the Indians' appropriation of it in the form of jurisdictional jockeying remained an important driving force of the colonial government's despotism in India. Further comparative studies on the relationship among the law, agency and emergency shall certainly enrich our historical understandings of the British empire and its colonies.<sup>89</sup>

(96,597 words)

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1890s, see Wiener, *Empire on trial*, 149–55, 167–72.

<sup>88</sup> Chandrachud, *Independent, colonial judiciary*, chapter 6.

<sup>89</sup> Cf. Benton, *Law and colonial cultures*; Benton, *Search for sovereignty*; Ford, *Settler sovereignty*; Hamal Foster, Benjamin L. Berger and A. R. Buck (eds.), *Grand experiment: Law and legal culture in British settler colonies* (Vancouver, 2008); Shaunnagh Dorset and Ian Hunter (eds.), *Law and politics in British colonial thought: Transpositions of empire* (Basingstoke, 2010); Mark Hickford, *Lords of the land: Indigenous property rights and the jurisprudence of empire* (Oxford, 2011); Saliha Belmessous, *Native claims: Indigenous law against empire 1500–1920* (Oxford, 2012); Shaunnagh Dorsett and John McLaren (eds.), *Legal histories of empire: Laws, engagements and legacies* (Abington, 2014).



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